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Supreme Court of the United States

OCTOBER TERM, 1955

No. 410

**AMERICAN AIRLINES, INCORPORATED,
PETITIONER,**

vs.

NORTH AMERICAN AIRLINES, INCORPORATED

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

PETITION FOR CERTIORARI FILED SEPTEMBER 21, 1955

CERTIORARI GRANTED NOVEMBER 14, 1955

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,041

NORTH AMERICAN AIRLINES, INC.,

Petitioner,

v.

CIVIL AERONAUTICS BOARD,

Respondent

AMERICAN AIRLINES, INC.,

Intervenor

On Petition to Review Order of the Civil Aeronautics Board

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BEFORE THE

CIVIL AERONAUTICS BOARD

Washington, D. C.

Docket No. —

In the Matter of the Application of NORTH AMERICAN AIRLINES, INC., for authority to conduct its operations under the name North American Airlines, Inc.

APPLICATION

North American Airlines, Inc. is a large irregular carrier holding and operating under the authority of a letter of registration issued by the Board to North American Airlines, Inc., the name of which corporation was at that time Twentieth Century Airlines, Inc. The letter of registration, therefore, is in the name of Twentieth Century Airlines, Inc.

North American Airlines, Inc. was originally incorporated as Twentieth Century Airlines, Inc. on May 4, 1946 in the State of North Carolina. Prior to May 21, 1951 the Company conducted and operated its business under the fictitious name, North American Airlines. On May 21, 1951 the Company filed a certificate of conducting business under the fictitious firm name of North American Airlines in the Office of the County Clerk of the County of Los Angeles, State of California. Said certificate was thereafter published in a Los Angeles newspaper of general circulation in accordance with requirements of California law where the principal office of the Company was located. Thereafter by amendment to its certificate of incorporation dated March 3, 1952 the name of the Company was changed to North American Airlines, Inc.

3 Until August 19, 1952 there was no rule or regulation of the Civil Aeronautics Board purporting to authorize the Civil Aeronautics Board to grant or withhold authority of an air carrier to operate under any name which it might desire to use. On August 19, 1952 the Board

adopted Regulation Serial No. ER-178, being Amendment No. 7 to Part 291 of the Board's Economic Regulations, under which it is made an express condition upon the operating authority granted to each large irregular carrier that such carrier shall hold out to the public and perform air transportation services, unless otherwise authorized by the Board, only in the name appearing in the letter of registration issued it by the Board.

North American Airlines, Inc. has invested substantial sums of money in the name North American Airlines and has developed substantial good will in that name. North American Airlines, Inc. is the legal and lawful name of the Company and became such legal and lawful name at a time when there was no Board rule or regulation purporting to regulate or control the names of air carriers.

Prior to adoption of this new regulation North American Airlines, Inc. by letter dated March 11, 1952 addressed to the Secretary of the Board, advised the Board of its change of name and suggested reissue of its letter of registration in the name North American Airlines, Inc. No answer to this letter has been received, and no action on the matter has been taken.

It is the position of North American Airlines, Inc.

(1) that Amendment No. 7 to Part 291 of the Board's Economic Regulations was not intended to apply to any change in name which had taken place prior to adoption of the regulation;

(2) that if it were intended to apply to such a change in name, the regulation is invalid, and it is requested, therefore, that the Board issue an order holding the regulation inapplicable to North American Airlines, Inc. or an order granting an exemption from its provisions.

In the event the Board holds the regulation to be applicable to North American Airlines, Inc. it is requested that North American Airlines, Inc. be granted authority to use its proper corporate name, North American Airlines, Inc. in conducting its air carrier operations.

North American Airlines, Inc. has a vested property interest in its name. Under the Board's regulations in effect

prior to September 23, 1952 it had the legal right to use the name North American Airlines and North American Airlines, Inc. in conducting its operations under its letter of registration which constitutes a license to engage in air carrier operation. Amendment No. 7 purports to modify this operating license. Any decision adopted pursuant to Amendment No. 7 which would purport to deny North American Airlines, Inc. the right to use this name would in fact purport to be a modification of North American's operating license.

Unless the relief requested herein is granted, North American requests a hearing on this application.

Respectfully submitted,

(S.) HARDY K. MACLAY,

Attorney for North American Airlines, Inc.

October 6, 1952.

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Orders

Serial Number E-7107

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
Washington, D. C.

Adopted by the Civil Aeronautics Board at its Office in Washington, D. C. on the 28th day of January, 1953.

Docket No. 5774

In the Matter of the Application of NORTH AMERICAN AIRLINES, INC., for Authority to Conduct its Operations Under the Name of North American Airlines, Inc.

Docket No. 5928

In the Matter of an Investigation Pursuant to Section 411 of the Act of Certain Practices of NORTH AMERICAN AIRLINES, INC.

Order

Twentieth Century Airlines, Inc. (Twentieth Century), a North Carolina corporation, was issued a Letter of Regis-

tration as a Large Irregular Carrier on July 22, 1947. Section 291.28 of the Board's Economic Regulations, adopted August 19, 1952, requires that, on and after November 15, 1952, any air carrier holding a Letter of Registration as a Large Irregular Carrier shall do business in the name in which its Letter of Registration is then issued and outstanding. However, such carrier may do business under such other or different name as the Board may by order permit, upon a finding that the use of such other name is not contrary to the public interest. The introductory comment to this regulation states that the November 15, 1952, cut-off date has been fixed so as to enable any carrier which has developed good will in a name different from that in which its Letter of Registration is held, to apply for and obtain permission to use such other name. Also it is pointed out that where good will has been established in a name by use thereof, the Board will deny permission to continue such name only in cases where it believes that a violation of Section 411 may be involved and such fact has been established after notice and opportunity for a hearing.

82 According to information furnished by the applicant, the corporate name of Twentieth Century was changed to North American Airlines, Inc. (North American), on March 3, 1952, by amendment to its certificate of incorporation. On March 11, 1952, North American, by letter, requested the Board to reissue the Letter of Registration heretofore in the name of Twentieth Century to North American. On October 6, 1952, North American applied for Board authorization herein to use said corporate name in its business after November 15, 1952, in lieu of the name "Twentieth Century". In support of its application, North American alleges that: it has invested substantial sums of money and good will in the name "North American" at a time when there was no Board regulation of the names of air carriers. It follows, therefore, that the promulgation of Section 291.28 was not intended to apply to changes in name occurring prior to the adoption thereof. If it were intended to apply to such a change in name, the regulation is invalid on the grounds that (1) North American now possesses a vested property right in such name which the Board may not now abridge; and (2) a denial by

the Board of the application would result in an unlawful modification of the operating license held by North American. In the event the Board holds the regulation to be applicable to North American, the application requests Board authorization for use of such name.

American Airlines, Inc. (American), filed a memorandum on October 17, 1952, requesting denial, alleging that: (1) approval of the application would permit nullification of the cease and desist order Serial No. E-5171 against Oxnard Sky Freight and flouting of the Board's regulatory processes; (2) the name "North American" infringes upon the established name of American, and constitutes unfair competition within the meaning of Section 411 of the Act, and that (3) North American has no vested right or established good will in the name "North American" which the Board is bound to recognize. On November 5, 1952, American filed "Supplement No. One" to said memorandum, setting forth evidence by way of affidavits that confusion results from the deceptive similarity of the name "North American" to the name "American".

We have considered the foregoing matters, and have concluded that they raise important issues of fact and law which can only be decided after a hearing, as is provided for under the aforementioned regulation. Accordingly, we have decided to defer action on North American's request of March 11, 1952, to institute an investigation to determine whether the use of the North American name by the applicant has constituted or does constitute an unfair or deceptive practice or unfair method of competition within the meaning of Section 411 of the Act, from which practice or method the Board should order North American to cease and desist, and to consolidate that investigation for hearing and decision with North American's application in Docket No. 5774. Pending the Board's final decision in this proceeding the continued use of the North American name by applicant shall not be deemed to constitute a violation of Section 291.28.

83 Accordingly, it is ordered that:

(1) An investigation, assigned Docket No. 5928, be and hereby is instituted to determine whether North American in engaging in air transportation under the name of

North American Airlines, Inc., North American Airlines, or North American has been and is engaging in activities and practices in violation of Section 411 of the Act, and if any such violation is established, whether the Board should issue an order directing North American to cease and desist from such violations;

(2) Said investigation be and hereby is consolidated for hearing and decision with North American's application, Docket No. 5774, and that said consolidated proceeding be immediately set down for hearing before an Examiner of the Board at a time and place to be hereafter announced;

(3) Action on North American's request of March 11, 1952, be and it hereby is deferred until final disposition of North American's application herein; and

(4) Except to the extent specifically granted herein, the request of American be and it hereby is denied.

By the Civil Aeronautics Board:

(SEAL)

(S.) M. C. MULLIGAN,
Secretary.

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
Washington, D. C.

Adopted by the Civil Aeronautics Board at its office in Washington, D. C., on the 19th day of February, 1953.

Docket No. 5774

In the matter of the application of NORTH AMERICAN AIRLINES, INC., for authority to conduct its operations under the name of North American Airlines, Inc.

Docket No. 5928

In the matter of an investigation pursuant to section 411 of the Act of certain practices of NORTH AMERICAN AIRLINES, INC.

Order Granting Leave to Intervene

A petition for leave to intervene in the above-entitled proceeding, pursuant to Rule 15 of the Board's Rules of Practice under Title IV of the Civil Aeronautics Act of 1938, as amended, having been filed by American Airlines, Inc.; and

The Board finding from the petition that such intervention will be conducive to the ends of justice and will not unduly impede the conduct of the Board's business;

It is ordered: That said petitioner be and it is hereby granted leave to intervene in the above-entitled proceeding.

By the Civil Aeronautics Board:

(S) M. C. MULLIGAN,

(SEAL)

Secretary

136 Examiner Bryan: Will the parties give their appearances to the reporter at this time.

Mr. Stratton: Howard C. Westwood and Ernest W. Jennes. They are not present at this time. I am appearing, and my name is Clifton J. Stratton, Jr., appearing for American Airlines, Incorporated.

Examiner Bryan: Who appears for North American?

Mr. Maclay: Hardy K. Maclay.

Examiner Bryan: Who appears for Bureau Counsel.

Mr. Johnson: Robert M. Johnson.

139 Direct examination. ✓

By Mr. Stratton:

Q. State your name.

A. Charles R. Speers, 60 Serpentine, Rosslyn Estates, Long Island, New York.

Q. What is your position with the American Airlines?

A. Assistant vice-president and general sales manager.

Q. How long have you held that position?

A. Four years.

Q. What other positions have you held with American?

A. Including predecessor companies I have been district sales or traffic manager at Detroit, Chicago and New York. I have been eastern regional vice-president for American with headquarters in New York, and my present position.

Q. How long have you been with American?

A. Including predecessor companies, for 24 years. Since March 1, 1929.

Q. Do you sponsor Exhibits AA-1 and 2?

A. I do.

Q. Were those prepared under your direction and supervision?

140 A. Yes.

Q. Are they true and correct copies of the things purporting to be copied and are the narratives to these two exhibits true and correct, to the best of your knowledge and belief?

A. Yes, sir.

Q. Is Exhibit No. AA-1 a representative sample of American Airlines' advertising?

A. Repeat the question, please?

Q. Is Exhibit No. AA-1 a representative sample of American Airlines' advertising?

A. It is a representative sample of American's newspaper advertising.

Q. Doesn't it also contain magazine advertising and other items?

A. Oh, yes, I am sorry, I didn't really remember that No. 1 went that far.

Yes, that is representative of American's advertising.

Q. Is American's sales effort limited to advertising?

A. No. American's sales effort includes not only advertising, but also direct selling. If you are referring to space advertising, American's sales effort also includes direct mail, literature, and all other types of selling normally engaged in by any sales department. Advertising represents a very high percentage of our total expenditure.

141 Q. Turning to Exhibit 1, pages 14 and 15, would

you explain a little more fully the items referred to there?

A. Those two pages show literature issued in connection with a motion picture which was produced in about 1936 or '37, I believe. Perhaps before that, describing a motion picture, the name of which was "The American Way." That motion picture was distributed through the usual channels, and shown to luncheon clubs, and schools, and all outlets of that type. The use of the term "American" and "American Way" has been common in American Airlines almost since its inception.

Q. In a number of the advertisements reproduced in Exhibit AA-1, particularly pages 3 and 4, and several of the succeeding pages, the advertisements identify American Airlines only as "American."

Has it been American's experience that such advertisements adequately identify American Airlines to the reader?

A. Yes. We found it advisable about three years ago to simplify our advertising and our signature. Our competitors have very prominent names in advertising, and we believed that we could gain by having as short and simple a name as possible. We introduced this example of signing our or using only the name of American in our so-called billboard advertising, and after approximately, I think a year, or perhaps less, of that style of advertising, we made some checks on the public and found that the identification of American Airlines, as an individual operator, with the name American, was clearly established, and we were satisfied after that check which showed that well over 75 per cent, and as high as 80 per cent, I think clearly identified that as an individual company, and didn't confuse it with Airlines of the United States, or some more general term.

We also experimented with this signature and in fact used it in our outdoors billboards where we simply say "Fly American." We took some checks on that and discovered that the identification of American Airlines with the signature "Fly American" was equally good with the signature "American Airlines."

Q. Now, the use of American alone in some forms of advertising actually goes back further than simply three years, does it not?

A. Yes, as indicated in the exhibit we previously referred to it was used, Exhibit AA-1, Nos. 14 and 15,—is that the way to identify that?

Q. Pages 14 and 15.

A. Pages 14 and 15.

You see evidence of the use of the name "American" alone. Also in Exhibit No. AA-1, page 16, you will see a DC-3 in flight over New York with the identification "American" on it. That was used for, I think, several years. Also our billboards shown on page 13, those are more recent, using the term "Fly America." The slogan "Better by Air" and "Best by American" is one that was used, 143 I think, six or seven years ago.

Q. How much is American currently spending on the newspaper and billboard advertising campaign illustrated on page 3, Exhibit 1?

A. Approximately \$600,000 a year.

Q. What has been your experience as a salesman for American with respect to identification of American, or American Airlines, by members of the public?

A: Well, we have realized that as the industry grew the importance of our name became greater, and the greater the competition the more important the intangibles of name prestige became, and the competition has reached a point now where over many routes the services are so similar that it is the intangibles of name, refinement of service, that determine the selection of a carrier.

We also have realized that with the introduction of low fare services, the inexperienced traveler must be clear in his mind as to just what carrier he is booking with. It is also the fact that in the low fare field you have a high percentage of infrequent travelers. And if they are confused in their purchase of their first trip you may have lost that business for a year, because they may travel only once a year. For that reason we have put more and more emphasis on the name itself.

For example, there have been periods in our advertising experience when we have tried to build up names like "Flagship" and "Mercury" and other forms of identifying of a company, and we concluded that about 144 three years ago that the thing to do was to concen-

trate on the name "American" because that was the most important identification we could have. I think we have succeeded because today it is common in my personal experience to have people refer to it simply as "American." It is as though you said you were the "New York Central." You don't have to say "New York Central Railroad." The public has accepted it all right.

We have a flight called the "Mercury" which is a trans-continental flight and from time to time we have introduced the name of flights into our advertising, but we don't do it so much now because we feel that it rather dilutes the advertising effect insofar as our main signature is concerned. So we don't put quite so much emphasis as we did in those days.

Q. Do you find that members of the traveling public with whom you deal associate particular characteristics with the name "American" or "American Airlines"?

A. Well, I am not sure I am clear on your question.

Q. Do you find that some members of the traveling public have preference for American or American Airlines?

A. Yes. We believe we have established the fact, both through advertising and through superior service, that "American" is America's leading airline, and I think a great many people accept that as fact. Our own surveys have indicated that, and we are satisfied that we have established a reputation for leadership and that many people, particularly people who are coming into the market for the first time, will buy American Airlines service because they have the belief they are buying a leading airline service.

Q. Do you find that members of the public with whom you deal as a salesman for American are familiar with such things as American's routes or types of aircraft used by American and that sort of thing?

A. Very definitely. Much of our advertising is devoted to identifying American with a certain route structure, and with a certain type of superior equipment. A great deal of our advertising has been devoted to routes and equipment.

Exhibit AA-1, page 8, shows a double page spread featur-

ing American's postwar fleet of all-pressurized aircraft, and we have constantly stressed American's equipment. We also have recently entered into a campaign to develop more traffic from the tremendous potential represented by automobile traffic, and have run a series of joint advertisements with both the Avis Company, as shown on page 7 of Exhibit AA-1, and the Hertz Company, shown on page 9, AA-1, where we again use the name "American" prominently to identify our services.

Q. Are the letters appearing as pages 6 through - 12 of Exhibit AA-2 representative of letters received by American Airlines?

146 A. Yes, those are actual letters and they are representative. We receive quite a substantial volume of replies to our direct mail. These are representative.

Q. In your 24 years of experience in selling for American Airlines has there been any change in the extent to which the public identifies American?

A. Very definitely. There was a time during the early days when you had to explain what American Airlines meant. Not only American, but—today with the volume of traffic and the general public acceptance of air transportation, the name "American" alone is very well established, I think, in the public as a whole.

Cross-examination.

By Mr. Maclay:

Q. Referring to page 3, Exhibit 1, do you use there
147 the name "American," and on those same ads if you had the name "North American" do you think that that would identify in the public mind this advertising with the American Airlines?

A. I think there would be an element of confusion in it, yes.

Q. If it said "South American" do you think there would be an element of confusion?

A. I think it is possible.

Q. If it said "All American," do you think there would be confusion?

A. Yes.

Q. If your word "American" was used in conjunction with any other word or words do you think there would be confusion?

A. For the most part, I think when the name "American" appears in connection with transportation I think there is a good possibility of confusion.

* * *

148 Q. Can you think of any combination of word with the word "American" that you feel would not lead to confusion?

A. If associated with air transportation, I think not. I think there is always an element, there is a possibility of confusion. I think if the other name were a very much longer name and American was merely one part of four or five words, or something of that kind, it might not, but I can't think offhand of any.

* * *

150 Q. You say you took checks on the public with respect to the use of the word "American" and the adequacy to identify "American" in the public mind. Did you actually conduct surveys of some kind?

A. We had two street surveys made in which we questioned people on certain signatures, yes.

Q. Now, these ads that you have in here in Exhibit 1, you have a lot of ads. If all those ads were substantially as they are here, but you had the word "North" in there in the same size letters and wherever "American" was used the word "North" was used, do you feel that that would confuse members of the public?

151 A. Yes, I do. I definitely do. In fact, we have considerable indication that there has been confusion on that very score.

* * *

By Mr. Maclay:

153 Q. You say that services are so similar that the name becomes very important? You mean the airline
154 services of all companies?

A. Well, the tendency is for all airline services to become more or less similar as aircraft ranges increase, for example, and it becomes possible for all airlines to operate practically the same route. At one time when aircraft had shorter ranges maybe route distinctions meant something. Today they mean much less. There is a tendency among manufacturers to standardize on certain types of aircraft, and today we have relatively few types of aircraft, whereas 20 years ago we had literally dozens where you could sell equipment; whereas today the equipment advantages are much less than they used to be. The fares are identical today. What few trade practices we have developed over the years gradually have been taken over by competitors and is a natural process, so that there are fewer differences today in services. Competition has picked up the advantages of other carriers to a point where the differences are very subtle and slight in many cases.

Q. You have air travel cards that are issued by American?

A. Yes.

Q. Do you know if on one of those travel cards you used the name, or you have the words, in the upper portion of the card, "North America"?

A. Yes, in very small type on the red card, which is a restricted card, there is a word "North America,"
155 and on the other the word "International."

Q. Are those cards issued by American Airlines?

A. By American and other airlines.

Q. Why did you adopt the wording "North America," do you know?

A. Because they are good only in North America.

Q. It is a geographic matter?

A. Well, I guess I stated it backwards. They are not good outside of North America.

157 Q. Mr. Speers, do you have any particular ads of North American Airlines which, because of format, or color, or the general set-up of the ads, that you feel are

so close to American Airlines' format and color and type of advertising that you feel the particular ads are particularly confusing?

158 The Witness: I don't have any particular ads in mind that I think are more confusing than others. I think any ad that includes "American" and "American Airline" is like to be confusing.

By Mr. Maclay:

Q. Any ad that includes "North American Airlines"?

A. No, that includes the words "American" or "American Airlines." I think it is especially likely to be confusing if as on page 2 you used the same style lettering that American Airlines uses. It is likely to be confusing by reason of the term itself.

Q. With reference—did you say Exhibit 9, page 2?

A. Yes.

Q. By type of lettering, what do you refer to?

A. I refer to that particular style of lettering used both in the signature at the bottom of that ad and at the top of the ad. That is American's style of lettering, as used in its magazine advertising signatures, for example. If you will turn back to page 9 of Exhibit AA-1, you can look at either 8 or 9, and the lettering "American Airlines" is the same style of lettering, slightly slanting. I don't

159 know the exact terminology. The exact description of these letters. But you can see the similarity by looking at them.

Q. They aren't particularly distinctive lettering. It is a normal type of lettering?

A. No, they are distinctive, in our opinion. We adopted that particular signature after a great deal of research. We had formerly used an entirely different type of signature and we finally settled upon this particular type of letter about—I think it was—about four years ago, if I recall.

If you will turn to page 14, of AA-1, you will see our former signature. It is a different style letter.

160 Q. Well, now, other than that ad, the ones you have just pointed out, do you have any other particular ads or particular advertising material of North American that you feel is similar to American Airlines' advertising to such an extent that the type of the ad leads to confusion?

A. I don't—

Mr. Stratton: I object to this as being outside the scope of the direct, and the purpose for which this witness was offered.

Mr. Mclay: This witness stated, Mr. Examiner, that the use of the name "North American" is confusing with the use of the name "American." And where it is used is in advertisements. And the reasons why it is confusing is either solely because of the word "American" or because of the similarity in the format, type, color, and so forth, of the ads, which in this type of case is ordinarily the most important consideration, as to whether the two types of ads are so similar that the types of ads lead the average member of the public to conclude that those are the same airline. And it is of utmost importance, and this witness being the sales manager, and vice-president in charge of sales, is obviously the person who is most familiar with it.

Mr. Stratton: I don't think it is obvious that he is the most familiar with American's advertising at all.

161 Mr. Maclay: I don't care who I ask, just so it is an American Airlines' person in support of your position.

Mr. Stratton: I do not plan to have any witness testify along the lines which he is inferring, Mr. Examiner.

Examiner Bryan: He may answer.

The Witness: I don't agree with you that it is either one or the other. I think it is quite likely that it is both. That the confusion results from both, the similarity in the name and the similarity of the ad. Now, the similarity of the name can make itself apparent in great many ways other than in the printed advertising. For example, radio. So I don't think you can pin it entirely upon a particular signature or layout of an ad, but where the printed signature ~~actually~~ resembled the printed signature we use the

confusion would be that much greater. But I think there would be confusion in any event.

By Mr. Maclay:

Q. You don't have any other particular ads that you want to point out?

A. I don't have any others.

162 By Mr. Johnson:

Q. Mr. Speers, referring to page 14, in Exhibit No. 1, it is my understanding that this is a throwaway sort of advertising rather than a newspaper or magazine ad?

A. It is a folder; yes.

Q. Is it in use today, at the present time?

A. No.

Q. How about on page 16, the exhibit there, is the name "American" at the present time on all the airplanes that American operates?

A. No, we have a different signature on our planes today than is shown here. Today we have "American Airlines."

Q. I would like to have you explain this air travel card a little bit more in how you sell it, to whom you sell it to, and whether it is by in person or mail or what. Expand it a little more for the record to be clear on it.

163 A. The air travel plan has been in existence as a universal air travel plan for about 18 years. The plan is sold primarily by personal solicitation of commercial cost. It involves the signing of a contract and the making of a \$425 deposit with the issuing airline. There are approximately a dozen issuing airlines. That is, airlines who issue cards.

Q. Are the names of these airlines told to the purchaser of the ticket, of the cards?

A. On whom he may use the cards?

Q. Yes.

A. This is a folder which is distributed with each card which gives him instructions about use of the card, yes. And one of the things it explains is what this "North America" and "International" means that we were referring to earlier.

Q. Is North American Airlines one of the sponsors of the plan?

A. No.

Q. Or is it a member of the plan?

A. No.

Q. Does North American Airlines appear in any of the literature that is circulated to the card holder?

A. No, it is not a member of the plan.

Q. And you say that North American—that the companies on the card are explained in the folders or in the brochures that are given to the purchaser?

164 A. Yes, it is, and it is not "North American."

It is "North America." For the most part, the distinction between the two is determined by the color. The printing of the words "North America" and "International" is so small that they are very hard to read. We depend mostly on the color, and the green card is the international card.

Q. To whom, mainly, is the air travel cards sold?

A. Primarily to commercial organizations. They put up the deposit and issue the cards to their employees to be used for air travel on a credit basis.

Q. Only those companies or persons who travel extensively by the plan; is that right?

A. As a rule, because it means putting up a deposit of \$425, so unless you have some volume of travel it wouldn't pay.

Q. Would you say that the ordinary traveler who travels maybe once or twice a year is the holder of an air travel card?

A. No.

Q. Getting back to the name "American" as it has been advertised by your company, would you say that there is much confusion between the word "American" and T. W. A. or United, for instance, in the minds of the average member of the public?

A. No, I think the public has those airlines pretty well established now in mind. I think some years ago perhaps there was, but today I think they are well established.

165 Q. Have you made any surveys with that in mind?

A. Yes, as a matter of fact, one of the checks I

referred to in which we asked people after looking at the ad with the American signature on it to identify it, was designed just to do that, to see whether they were confused in their minds as between all airlines or whether they could identify one, and we had that clearly in mind. The response indicated that the public today is pretty clear in its mind of the individual air carriers.

166 By Mr. MACLAY:

Q. Referring to Exhibit No. AA-2, page 9, and also Exhibit No. 2, page 12, at the top of each of those it says "Dear Mr. C. B. Smith, I am flying with American." Is that in the form that these people send in, or does the individual write that in, himself?

A. I think that is printed on the form.

169 Redirect examination:

By Mr. Stratton:

Q. Directing your attention to Exhibit AA-1, page 7, and particularly the tail of the aircraft appearing in the add on that page, is that typical, or is that the present form of identification used on American's aircraft?

A. Yes, sir. That is the standard identification.

Q. That is, the word "American" alone appears on the tail of the aircraft, and the words "American Airlines" appearing along the body of the aircraft, is that correct?

A. Correct.

Q. That form of identification is also illustrated in Exhibit No. 1, page 8, is it not?

A. Yes, sir.

Q. On some of the aircraft appearing there?

A. Yes, the large aircraft on the left.

172 Direct examination.

By Mr. Stratton:

Q. Will you give your name and address?

A. Frank M. Burg, 3144 Coolidge Avenue, Los Angeles 34, California.

Q. What is your position with American Airlines?

A. District Sales Manager in Los Angeles.

Q. How long have you held that position?

A. I have held the position approximately four and one-half years.

Q. What are your duties as District Sales Manager?

A. As District Sales Manager I am responsible for the development of sales in the Los Angeles District, for the handling of traffic for American Airlines.

I am responsible for the operation of our reservations department which consists of personnel to the extent of about 90 people, our ticket offices where we employ 173 27 people at the present time and an outside sales force of 16 men, including supervisory personnel. It is my responsibility to develop passenger business, and secondly to handle it.

Q. What other positions have you held with American Airlines?

A. I have been a sales representative, Assistant to sales manager, District Sales Manager in Detroit, Director of Sales in Dallas, Texas, and Director of Sales, that is, Regional Director of Sales, in Los Angeles.

Q. When were you first employed by American Airlines?

A. First employed by American in March, 1935, after having spent five years with Western Air Express in Los Angeles.

Q. Do you Sponsor American's Exhibits Nos. AA-4 and AA-7?

A. Yes, I do.

Q. Were these prepared under your direction and supervision?

A. Some of the material was prepared under my direction and supervision. Some of the material, at least a portion of it, was received from people on the outside, such as this letter from Robert M. Light, which is page 2 of Exhibit

No. AA-4. That is a letter received from Mr. Light, who is an attorney at San Bernardino, in November, 1951, in which Mr. Light directs our attention to the fact that 174 he heard a radio broadcast to the effect that we had a \$70 fare to Chicago, and on attempting to purchase a ticket at that fare, at American Airlines' ticket office, he was surprised to find that the charge was \$85 instead of \$70.

The next page is a letter I wrote to Mr. Light pointing out to him that American Airlines did not advertise on the radio, and pointed out that our fare was \$85, which was our tariff, and no doubt there was a misunderstanding as to airlines.

Page 4 of the Exhibit is a copy of a letter that Mr. Light sent to me, addressed to radio Station KMPR, in which he pointed out to them that he had attempted to buy a ticket from American Airlines at the rate of \$70 and was unsuccessful, and paid \$85 for the ticket.

This particular letter inquires as to whether American Airlines did advertise such a fare. Page 5 is another letter from Robert Mack Light to the Radio Station indicating that he had received a letter from the radio station, and indicating also, I believe, that he did not hear the word "North" in the radio advertisement, and mistook it, therefore, for being an American Airlines' spot announcement.

Q. Do you have the originals of the three letters from Mr. Mack Light?

A. Yes, sir.

Q. And the carbon of your letter to Mr. Mack Light?

A. Yes, sir.

.

175 Q. Are the items in Exhibit No. AA-4 true and correct copies of the things which they purport to be copies, to the best of your knowledge and belief?

A. Yes, they are.

Q. Mr. Burg, has it been your experience as a Sales Manager for American, and as the District Sales Manager for American that members of the travelling public identify the Company for which you work by the names "American", and "American Airlines"?

A. Yes, sir; that definitely has been my experience. Over the years I have seen an increasing tendency in that
176 direction. Going back to my original association with American Airlines in 1935 I can well recall that people did not associate, did not have an understanding of American, or American Airlines, because I well remember it was necessary then, and in some of the intervening years, to explain American Airlines very thoroughly.

But over the years as the result of advertising and sales effort, and I believe as the result of the type of service we have given people clearly distinguish American Airlines, and they know American Airlines for various reasons.

Q. What are some of the reasons?

A. Well, we are well known, for example, because of our airplanes, the type of aircraft we operate. We have a completely new post war fleet.

People recognize American Airlines because of its service standards, such as its meals, courtesy to customers, and service aboard the airplane, the kind of reservation service we provide in our ticket offices. There is no question in my mind but what they clearly recognize American Airlines for those facts.

The advertising we have done over the years selling American as a leading airline.

Q. To your knowledge are operations in air transportation conducted in the Los Angeles area under the name "North American", and "North American Airlines"?

177 A. Yes, they are conducted, to my knowledge. I have seen advertisements, and I have heard radio spot announcements on North American Airlines, and on occasions television advertising.

I am familiar with the fact that North American Airlines has operated from Lockheed Air Terminal in Burbank as the result of being there and hearing their departure announcements, and there are North American Airlines ticket offices in the Los Angeles area.

Q. Does American also maintain a ticket office at Burbank at the Lockheed Air Terminal?

A. Yes, sir. We have had a ticket office at Lockheed Air Terminal for a number of years.

Q. Is that ticket office under your direction and supervision?

A. Yes.

Q. Have reservations, ticket and sales personnel under your supervision in the Los Angeles area brought to your attention instances of confusion between the names "North American" and "American"?

A. Yes, they have, on numerous occasions. They have talked to me about the confusion between the names "North American" and the name "American Airlines." And it has not been an infrequent occurrence.

178 Q. Now, what form does that confusion take; form or forms does this confusion take?

A. Well, people telephone us thinking that they are calling North American Airlines. To illustrate the point—

* * * * *

The Witness: I have a memorandum to illustrate the point that is specifically from our Chief Telephone Operator. Her Name is Timmers, in which she says that the telephone calls are received from people asking us to accept them on a collect basis, which is contrary to our policy, which are refused, and the questioning of those that are trying to place these collect calls indicates that they are asking for North American Airlines.

* * * * *

179 Q. The original question I asked ~~was~~: What form or forms of confusion had been reported to you by personnel under your supervision?

180 A. One of the forms was this thing that I explained on telephone calls. There have been other forms that are explained specifically in this exhibit. Cases where ticket agents and reservations agents have talked to members of the public who have been confused between American Airlines and North American Airlines.

If you will refer to page 7, Exhibit No. AA-4—well, let us refer to page 6 of Exhibit AA-4. That is a copy of an affidavit that was written after I received a telephone call

from a gentleman who represented himself to be a Mr. James C. Meeks who telephoned me on the telephone that one of our signs was being re-painted by non-union painters, and that unless some action was taken he threatened to picket us.

I asked Mr. Nicholls to check into the situation and call Mr. Meeks. He did so as indicated in this affidavit, and explaining to him that we were not having any signs re-painted, and Mr. Meeks called him back later in the day and advising that the American Airlines office involved was on Hill Street. Well, we have no Hill Street location in Los Angeles. Mr. Nicholls was then informed that it was an error, and it was not American Airlines office, and that it was North American Airlines' sign that was being re-painted.

Q. Mr. Nicholls is an employee under your supervision?

A. Yes, sir. He reports directly to me, and is Manager of our ticket office in Los Angeles.

Q. Now, at the time he took care of the matter discussed on page 6 did he then report back to you and explain how the matter had been ironed out?

A. Yes, sir. He reported back to me and told me about it and I then asked him to put it in writing, which he did in the form of this affidavit.

183 Q. Mr. Burg, refer to pages 6 through 18 of Exhibit No. AA-4. Were the affidavits of which these pages are copies obtained under your supervision and direction?

A. Yes, they were.

Q. Under what circumstances did you obtain these affidavits?

A. Under what circumstances?

Q. Yes.

A. As the result of comments to me on the part of personnel relative to confusion between the names "American Airlines" and "North American Airlines", and "American", and "North American" I asked these people who

were under my supervision to place in writing these specific cases, which they did.

.

184 Q. When was this group of affidavits assembled?

A. Assembled last October. I believe all of them were assembled then. Yes, they were. All assembled last October.

Q. Am I to understand from your testimony that the purpose for assembling this group of affidavits was to attempt to pin down the nature of the incidents that had been reported to you from time to time in the past by the personnel under your supervision?

A. That is correct. They are varied, as can be seen by reading them. Some of them were prepared by a ticket agent and some by reservations agents, and one by a supervisor, that I see here, and they were all assembled in October.

Q. Based on your conversations with personnel under your supervision are these pages, 5-6 through 18 representative of the types of incidents involving confusion which you have discussed with the employees under your supervision?

A. Right. Some of them as can be seen have to deal with persons phoning us to ask us for the arrival
185 time of flights which were not American Airline flights. Cases of people walking into our office, our ticket offices, and stating to our ticket agents that they thought they were in a North American office. Page 8 of AA-4 is an illustration of that very last one. This is the case of an individual walking into the Beverly Hills office of American Airlines, wanting to pick up a ticket. Their various types are represented in the various affidavits.

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186 Q. Now, after assembling this group of affidavits, last October, what further steps did you take to determine the nature and frequency of incidents involving confusion between North American and American, occurring in Los Angeles?

A. Well, in November, for a two-week period, specifically

between November 8 and 23rd, I asked the personnel under my supervision to write down cases that came to their attention on a day-to-day basis, where American and North American were confused.

In that two-week period, I received sixteen different cases of confusion from reservations and ticket agents.

Ten of the sixteen cases were received in the first week. The balance of the sixteen in the last week. But there was better than an average of one a day.

Q. Did you provide the personnel with a form to use in making such reports?

A. Yes, I did.

187 Q. All right.

A. This is the form here. It was a dittoed form, which the agent filled out as to date and time that a confusing incident occurred, and the individual filled in the form, saying what the caller said—the individual to whom they were talking said, with respect to confusion on the names.

Q. These are the original reports received?

A. These are the original reports.

Q. And they have been reproduced, have they not, as pages 19 through 34 of Exhibit No. AA-4?

A. That is correct.

Q. Based on your discussions with personnel under your supervision, are the reports reproduced as pages 19 through 34 of Exhibit AA-4, representative examples of the sort of confusion between American Airlines and North American, as reported to you by your personnel?

A. Yes, they are.

Q. Is it American's policy to accept collect telephone calls in the Los Angeles area?

A. No, it is not. We accept no collect calls.

188 Q. Do you know whether North American advertisers in Los Angeles that it accepts collect calls?

A. Yes, I do. I have seen advertisements of theirs stating that they did.

Q. I now show you a document which has been marked for identification as Exhibit AA-10, and call your attention to an advertisement headed "Fly North American Airlines," and in the middle of the advertisement, to the lines "Call Collect TR-0711." Is that the sort of advertisement you had in mind when you said you knew North American advertised that they would accept collect 189 calls?

A. Yes, it is.

Q. Do you know whether they also advertise that on the radio?

A. I have heard radio announcements to the same effect, yes.

Q. Do you know whether attempts have been made to place with American Airlines in Los Angeles collect calls, by persons intending to contact North American Airlines?

A. Yes, I do.

Q. What is the source of that information?

A. The chief telephone operator of American Airlines in Los Angeles, who informs me that we regularly receive calls on a collect basis—

Mr. Maclay: I object, Mr. Examiner, to the answer "regularly receive." I mean, is it ten times a day, or five times a week, or once a month? What is it? All of these conclusions are very difficult to combat when you don't have the people here who are the basic source of information, and I don't think we should be too liberal in permitting these conclusions to go in.

Examiner Bryan: Well, that is quite correct. Can you tie that down?

The Witness: I am in no position to say specifically how many calls are received per day, per week or per month, but I can specifically say that it is a daily occurrence.

190 Now, as to the numbers, I am in no position to say.

Mr. Maclay: You mean that it occurs every day?

The Witness: That is right.

Examiner Bryan: Who did you get this information from, the telephone operator?

The Witness: Yes, the telephone operator has asked me frequently what to do with these calls. We have a clearly fixed policy that we cannot accept collect calls from anyone

but company personnel, and I have instructed her to that policy.

Examiner Bryan: These collect calls are for North American Airlines, is that correct?

The Witness: That is correct.

By Mr. Stratton:

Q. Turning now to Exhibit No. AA-7, is it your understanding that the robbery referred to in the newspaper stories reproduced in that exhibit, which identified the scene of the robbery as an American Airlines ticket office as 631

South Olive Street, in fact took place, in a North 191 American Airlines' ticket office?

A. Yes. We do not have an office at 631 Olive Street, but there is a North American Airlines' office at that address. We had no robbery at any of our ticket offices at the time this article was printed.

Q. I now hand you the document marked Exhibit AA-11 and ask you what you know about that document?

A. This was a sealed envelope that was delivered to American Airlines' office at 521 West Sixth Street, addressed to North American Airlines. This envelope was brought to me. I had the envelope photostated, and afterwards it was returned, in the mails, to North American Airlines.

Q. By "returned," you mean forwarded?

A. Forwarded.

Q. The street address given on the envelope is not the address of American Airlines in Los Angeles?

A. That is the address of American Airlines in Los Angeles, yes. 192

Q. You did not open the letter?

A. I did not open the letter.

Cross-examination.

By Mr. Maclay:

Q. Mr. Burg, how long ago were you advised to make preparation for this case?

A. The only advice I received was to prepare to run this survey that I previously mentioned, in November—this two week survey, that we discussed before, wherein we asked our agents to write down specifically cases of confusion that came to their attention.

Q. Well, these exhibits, such as Exhibit AA-4, page 8, those were all in October?

A. The affidavits?

Q. Yes.

A. Yes, those were done in October.

Q. Well then you received advice with respect to the case prior to November?

A. I wouldn't say that I received advice with respect to the case.

Q. Well what advice did you receive, then, that caused you to make these affidavits, or have them made up?

A. Well, this matter of confusion was brought to my attention very frequently.

Q. When?

A. When?

Q. Yes.

A. Well, over a period of many months.

Q. By whom?

A. By our personnel. And these affidavits were prepared in October, so that it wasn't conversational and we got something actually on paper from our people. Up until that time, our discussions were all verbal and these cases were brought to my attention in that fashion.

Q. Did you have the affidavits prepared entirely at your own initiative?

A. No, they were prepared because of my own initiative and after discussing the matter with other people in the company.

Q. Well, were you told by someone in the company to get these affidavits?

A. Yes, that is right.

Q. When?

A. It couldn't have been before last October.

Q. Well, it was presumably October since you got them prepared and they are dated in October?

A. Yes, presumably so.

194 Q. Have you heard North American's radio advertising?

A. Yes, I have, on occasion.

Q. Do they ever use the word "American" without using the word "North"?

A. I have never heard any failure to use the word "North." I have heard—I think North American Airlines has been used in each case that I have heard. I think maybe it is because the words "American" and "Airlines" are longer words, but it has occurred to me in hearing these spot announcements that the "American Airlines" was predominant in the broadcast.

Q. Predominant in the sense that the person who was giving the broadcast was given greater emphasis to "American" and to "Airlines" than he was to the word "North"?

A. Well, maybe it is because I am in the position that I am in. Probably the best way I can explain it is as I have, the word "American" and the word "Airlines" have been emphasized to me. I cannot say and will not say that "North" was not used.

Q. You say they have been emphasized to you. What do you mean?

A. Well, those are the two words that have been outstanding in my mind in listening to these spot announcements.

Q. Yes, well that is in your mind, but so far as the broadcast is concerned, is there any difference on the emphasis in the use of the word "North" and "American"?

195 A. I can't testify that I ever heard any difference, no.

196 Q. But you don't operate out of Burbank, do you?

A. No, we don't.

201 Q. Are there other factors other than simply the name of "American" and the inclusion of the word "American" in North American's name, that you feel leads to the confusion that you say exists?

A. Are there any other items? Is that your question?

Q. Any other factors that are responsible for the alleged confusion?

A. No; I think of no others.

204 Further cross examination.

By Mr. Maclay:

Q. Mr. Burg, to your knowledge, is North American Airlines the only carrier that advertises that collect calls will be accepted?

A. No; I have seen advertisements on the part of travel agencies, presumably ticket agencies, indicating that collect calls will be accepted.

Q. As a matter of fact, in the non-scheduled airline industry, do you know whether the non-scheduled airlines quite generally advertise that collect calls will be accepted?

A. I don't know that that is a general practice of the non-scheduled industry; no.

Q. You have seen an ad of North American Airlines that says that.

Have you made any effort to look at other ads to find out whether other ads of other carriers say that?

A. I have seen other ads that have said that; yes, sir.

Q. Now, when a collect call comes in to your operator, you don't accept the charges. That is the end of the discussion; is it not?

205 A. Not according to our operators. There is usually a discussion as to why we will not accept the call, and according to reports that the operators have made to me, in the discussion, mention is made by the caller that "Well, this is North American Airlines; isn't it? And I read your ad in the paper. Why don't you accept my call?" or "I heard your ad on the radio."

Q. Well, then, the person making the call, presumably

put in his call to the operator and asked for North American Airlines; is that right?

A. No; I would—I don't know just how that would work. I suppose a person could call and—I don't know where they would obtain our phone number, actually.

Q. Well, probably out of the phone book; wouldn't you guess?

A. Might be.

Q. So apparently the person making the call looked up American Airlines, and got the number.

A. That is certainly a possibility. Certainly.

Q. Well, then, in order for this thing to show any confusion, the person who looked up American Airlines, got the number, called, and then he would have had to say "I am after North American Airlines;" is that right?

A. That would seem to follow; yes, sir. He would get us on the phone and say, he would place a collect call to
206 our telephone number, then our operator would challenge the collect call, saying that we do not accept them, and then the discussion would ensue.

Q. Well, if the person was looking for American Airlines, and called American Airlines, I have difficulty in following just why that same person would then ask for North American Airlines.

A. Well, I can't explain that, either, except that I do know, and have been informed by our switchboard operator, that they get these collect calls, and people are under the impression they are calling North American Airlines.

The mechanics of it, I am not familiar with.

208 Q. On these phone calls, Mr. Burg, have you questioned any of your people with respect to whether any of them were not people calling North American Airlines, but possibly trying to get hold of some other agency or airline? Some other airline that handles collect calls?

A. I haven't specifically asked them "Have you ever received a call from Blank Airlines;" no.

Q. I say, with respect to the way in which you have handled your personnel in this subject matter, the only ones that would be reported to you would be instances where they concluded that it is a North American Airlines confusion?

209 A. No; I think other cases would have been reported to me, too, had it been a problem in the minds of our operators, had there been any—had calls been received with any degree of regularity, I am pretty certain they would have mentioned it to me.

Q. Did you ask them to report all sorts of cases where there was confusion, or just North American Airlines?

A. They reported just North American Airlines confusion to me.

Q. Did you ever sell a ticket to anyone who thought he was getting a North American Airlines ticket?

A. Did I, personally?

Q. Did you or your personnel, under your supervision?

A. Not to my knowledge: I am sure we would have explained the difference.

Q. But someone could have come up to your counter and ordered a ticket to such and such a place, without naming any airline, and then when you gave it to them, the fare would be different, and they would say "look, I thought it was supposed to be \$70?" instead of some other figure, and then you would say "That is North American Airlines."

Do you know of any instance where you have written up a ticket for somebody like that, and then had to take it back, and say "no?"

A. A specific instance I know is this case of Robert
210 M. Light, that we referred to before. He sent someone to an American Airlines office to buy a ticket at a lesser fare.

Mr. Maclay: Which one is that?

Mr. Stratton: Page 2 of Exhibit 4, I believe.

The Witness: In that case, as his letter indicates, he was sent in to your office to purchase a \$70 ticket, and paid \$85 for it.

Cross examination.

By Mr. Johnson:

211 Q. Over what period of time would you say that employees have reported the incidents of confusion to you between North American Airlines and American Airlines?

A. Well, it has been a period of a couple of years, anyway. It has been over a period of many, many months.

Q. It is just over the recent months, previous to this time?

212 A. No.

Q. Or does it extend back further than that?

A. It extends back further than that.

Q. Does it include all the year 1952?

A. I would say so; yes, sir.

Q. Does it include all the year 1951?

A. Yes, sir; I believe so.

Q. How about 1950?

A. I can't be specific on that.

Q. So that your survey, that you conducted in October and November, was based on your experience prior to that date?

A. That is correct.

Q. Or these dates?

A. That is correct.

Mr. Stratton: Mr. Johnson, I am not sure whether that question doesn't contain an ambiguity, in that you stated the survey was based on something. Clearly the survey is for November. If by "based on," you are referring to the things reported in the survey, includes only an occurrence during the two weeks in November. If you by "based on" mean the reason for conducting the survey—

Mr. Johnson: Yes, sir; the survey was conducted for that period of time, because in the past you have had instances reported to you of confusion.

213 The Witness: Yes, sir; that is the way I understood your question.

By Mr. Johnson:

Q. I mean, the confusion, to your knowledge, did not originate in October or November?

A. That is absolutely correct.

Q. This was just the base period taken?

A. Right.

Q. To determine the exact number of those complaints?

A. That is right.

215 Redirect examination:

By Mr. Stratton:

216 Q. Now, in connection with the affidavits which were prepared in October, did you request the personnel to report every instance of confusion between American and North American known to them, or did you give some other form of instruction in connection with the preparation of those affidavits?

217 A. I asked them to report specific cases of continuous confusion that came to their attention, any unusual cases of confusion that came to their attention, or had come to their attention.

For example, here is an unusual one, on page 13 of Exhibit AA-4, written Frank Kirshberg, who made out this affidavit, received a call from somebody telling him that a signboard of ours at Hollywood and Vine was inoperative, and the caller said "You are American Airlines, are you not?"

Well, that is an unusual type of case, which is what I asked for, or repetitious confusion that had come to the attention of an agent. Does that answer the question?

Q. Well, did you ask them to report each and every incident of confusion known to each and every one of them?

218 A. Oh, no. That would have been an impossibility because these people were engaged in answering telephones, and handling many, many customers.

Q. In connection with another question on cross examination by Mr. Maclay, you explained that American does not operate out of Burbank.

Have there been occasions, during the last two or three years, when American has operated out of Burbank Airport?

A. We only use the Burbank airport as an alternate airport. That is, when the LA International Airport is below limits, we have had flights go into the Burbank airport.

But we have not scheduled any flights out of Lockheed Air Terminal.

Recross examination.

By Mr. Maclay:

219 Q. Did you know why you were getting these affidavits and the information on these phone calls with respect to confusion between North American and American?

A. Did I know why?

Q. Yes, sir.

A. Yes, sir, I knew why we were getting them.

Q. Why were you getting them?

A. Well, because there was confusion and we merely asked our people to get the information as evidence of confusion.

Q. To be used where?

A. Well, to be used perhaps here, or perhaps at some future date.

Q. You didn't know that there was a case pending in which you were going to possibly use this material in a hearing?

A. No, I did not know this case was pending. That is correct.

Q. Did you know that you were going to use the material in a case involving confusion between North American and American's name?

A. Yes, I knew that there was a possibility of a case, where it would be, I did not know, or what kind of a case it would be, I did not know, but we recognized it as a problem.

Q. You knew you were getting evidence for a case, didn't you?

A. Yes.

Q. So you proceeded to get affidavits from your personnel to support the confusion allegation; is that correct?

A. That is right.

Q. And you undertook to get the best evidence you could, I assume; is that right?

A. We asked for specific evidence, yes. We asked our people to provide us with specific evidence.

Q. You told them you wanted these affidavits, and you wanted material to support this confusion allegation; is that right?

A. We asked them if they had encountered any confusion between the names, North American Airlines and American Airlines.

Q. You are employed by American Airlines, and presumably you were doing the best job you could for American; is that correct?

A. Yes, sir.

Q. And this was part of your job to get this evidence; is that right?

A. Yes, sir.

Q. Now, did you ask these people to get you everything they could on it, having told them what you wanted?

A. I asked them to be very specific in their comments.

Q. And to get every example they could of specific comments?

A. No, I realized in asking them that they could not remember back many months for all of the cases of confusion that had come to their attention. I realized that fully. Because these people, many of whom are reservation agents,

handle hundreds of—well, literally hundreds of telephone calls per month, and hundreds of passengers per month.

Q. And the ones you wanted them to get information on were the ones where there was some confusion?

A. That is right.

Q. Now you said that you limited your instructions to them, as I recall, to specific cases of continuous confusion. What do you mean by that?

A. Where there had been a repetition of confusion.

For example, people walking into our office with any degree of—well, people walking up to our office in the terminal with any degree of frequency—

Q. Do you mean the same person?

A. No, different people.

222 Q. Well then, what do you mean by frequency?

Your only interest in North American Airlines, at this point—what do you mean by “continuous confusion”?

A. I asked them to tell me, to advise me where a particular type of thing had happened repeatedly.

Q. In other words, if somebody came in and was confused, between North American and American, you wanted that; is that correct?

A. Right.

Q. Well, where do the specific cases of continuous confusion come in? I don't understand what you mean. Each instance is a particular person coming in, and according to the allegations, he is confused on North American Airlines and American.

Now I assume you wanted each of those instances; is that correct?

A. Well, to illustrate the point, if people regularly walked up to you—

Q. Do you mean the same person walking up regularly?

A. No.

Q. Different people?

A. Different people.

Q. At different times?

A. Yes.

223 Q. So each of these is a specific instance that you are talking about?

A. That is right.

Q. All right.

A. If, for example, people made it a habit of walking up to our ticket counters to be checked in for a North American Airlines flight, I wanted to know that.

Q. But all you wanted were specific instances where a specific person came in and was confused on North American and American; isn't that right?

A. I wanted specific examples, yes.

Q. That is right?

A. Yes.

Q. You also said that it was limited to any "unusual cases of confusion" that came to their attention.

What is an unusual case of confusion, here?

A. Where people were clearly—where they clearly walked into our office or called us on the telephone—

Q. You say when they clearly walked into your office?

A. Or called us on the telephone and said "Look, I would like to know what time your flight is arriving" and they gave us a flight number that we did not have. And it was determined that it was North American Airlines' flight.

Q. Are those the only types of confusion you asked them to get?

A. No, that is a type. The other types—

224 Q. Is that, in your opinion, an unusual one?

A. That is unusual?

Q. Yes.

A. No, that is not unusual.

Q. Well then, that is not one of these that you are talking about. You say "any unusual cases of confusion" that came to their attention. Now what do you mean by that?

A. Well, I think we have to separate these things.

Number one; we wanted specific cases of repeated confusion.

Q. Now just a minute, you are not talking about the same person on two occasions?

A. No.

Q. You are talking about specific examples of a type of confusion that is repeated? Is that it?

A. That is right.

Q. You did not want them to give you a type of confusion, if it was not a specific type that had been repeated?

Examiner Bryan: I think we are getting into confusion.

Mr. Maclay: Mr. Examiner, he has made too many statements here which confuses the record.

Mr. Stratton: Mr. Examiner, he interrupted the man in the middle of his answer, took him off in a different direction. Now I think that the witness was about to straighten this thing out until Mr. Maclay attempted to get it snarled up again.

Mr. Maclay: I don't know as of which time you are referring; but I don't think it is straightened out yet.

Examiner Bryan: I don't believe you have helped in getting it straightened out.

I wonder if you couldn't give us some more information as to your instructions to these employees, as to the type of confusion which they were to look out for and report?

The Witness: Well, we asked them to tell us of any instances where American Airlines was confused with North American Airlines.

227 Mr. Maclay: I thought some of the things he had up there that I haven't seen were not phone calls.

Mr. Stratton: Not that were marked for identification. He referred to some memorandum that he had, but they were not being offered as exhibits.

232 Examiner Bryan: I think that is sufficient.
Exhibit AA-7 will not be received in evidence.

Exhibits AA-10 and AA-11 will be received in evidence, with the understanding that two copies will be furnished to the reporter before the close of the hearing, and copies served on the parties.

233 Direct examination.

By Mr. Stratton:

Q. Would you give your name and address to the reporter?

A. Emily Jeanne Newkirk, 906 Wilshire Boulevard.

Q. What is your position with American Airlines?

A. Assistant Ticket Office Manager at the Statler, in charge of the Statler office now.

Q. What previous positions have you held with American?

A. Before that I was the Assistant Ticket Office Manager in charge of the Burbank office, and previous to that I was in reservations.

Q. How long were you at Burbank?

A. About three years.

Q. Can you give us a brief description of the interior of the Burbank Airport?

234 A. The airport now is in a "T" shape, with the entrance at the stem of the "T", with no counters on the immediate entrance, and facing the entrance at that particular view, going in, would be Western Airlines and United Airlines.

At the break of the stem would be North American, on the left of United, and TWA on the right of Western, and then the corridors out, across the top of the "T", would be other carriers, and American is on the right hand wing.

Q. Is the North American counter visible as you enter the airport building?

A. Not at the exact entrance, it is on the inside of the airport, yes, sir.

Q. Well, that is, at what point—

A. Within fifteen or twenty feet inside the terminal building.

Q. While you are still proceeding down the stem of the "T"?

A. Yes.

Q. And at that point is the American ticket counter visible?

A. No, you have to turn a corner to approach the American counter.

Mr. Johnson: Mr. Examiner, may I interrupt here? It might help if she drew a rough diagram of the "T", and placed it in the record, so she could show where all these particular offices were. I think it might help the record to show that.

235

Examiner Bryan: I don't believe that will be necessary. Just what are you trying to establish? Does North American have a ticket office there?

The Witness: Right next to United, facing the entrance of the terminal.

By Mr. Stratton:

Q. And that is visible while you are still in the stem of the "T" entering the terminal?

A. Yes. This is new, and I think was completed, as far as the wing where the American office is now—I am not sure of the month, but I think it was last October or just previous to that. Previous to that American Airlines occupied the position TWA has, and then we were right across from that position. We were in the center of the terminal. Now we are not.

Q. Now as I understand it, the American ticket counter in the Burbank Airport Building is now so located that it is not visible from the stem of the "T", but that you have to turn to your right, whereas, while still in the stem of the "T", the North American ticket counter is visible, not directly ahead, but somewhat to the passenger's left; is that correct?

Mr. Maclay: Mr. Examiner, if this is important, I think there should be a diagram. I don't know what it goes to, but I am confused.

236 Examiner Bryan: I don't know, either. I can't understand the importance of it at this time, anyway.

Mr. Stratton: I think the importance will come out during the further testimony, Mr. Examiner.

Q. Miss Newkirk, I now hand you Exhibit No. AA-4, page nine, being a copy of an affidavit, and ask you if that is your affidavit that is reproduced there.

A. Yes, it is.

Q. In the first paragraph, where you refer to passengers checking in, exactly what do you mean by passengers, by the sentence in which that phrase appears?

A. Where the passengers actually arrived at the Ameri-

can Airlines counter with their baggage and their ticket, and had the baggage brought into our baggage wells.

237 Mr. Stratton: At this point, Mr. Examiner, I would like to have marked as American's Exhibits AA-12-A and B, two coupon books bearing the legend "North American Airlines" on the cover.

Examiner Bryan: They will be marked for identification.

(The documents above referred to as American Airlines Exhibits AA-12, A and B, were marked for identification.)

By Mr. Stratton:

Q. I now show you, Miss Newkirk, American's exhibits marked for identification as AA-12, A and B, and ask you if that is the type of ticket on which the North American passengers to whom you refer attempted to check in at the American Airlines ticket counter?

A. Yes, sir.

Q. With what frequency did this occur?

A. Practically daily, if you were on duty on the night shift. I didn't work the same shift all the time.

Q. Now why is the occurrence more frequent on the night shift than on the day shift?

A. Our agents go off duty before the flights depart from Burbank—

Mr. Maclay: I didn't hear you.

The Witness: Our first agents go off duty before there are any departures out of Burbank on the second shift. In other words, if I were working days, I wouldn't be there at night, when the departures were leaving Burbank.

238 By Mr. Stratton:

Q. Do you remember any particular instances involving such attempted check-in's?

A. One specific instance was when I was having dinner in the Steiner Room, which is the upstairs dining room, in other words, of the terminal, and I was paged back to the counter three times—if I would leave the counter, being the only agent on duty, usually TWA's agent or Western's agents would have me paged back to my counter, because I was the only agent available—which was what called the

pages, and I came down at three times and at no instance were they American Airlines passengers, but North American passengers with their baggage, trying to check in.

Q. Do you have any independent recollection of the Buyers' League script book episodes discussed in the second paragraph of page 9 of Exhibit AA-4?

A. This was the first one of the books that I had actually seen, and the man said that there were pamphlets handed out at their company, or at their organization, wherever they met, that stated American Airlines gave them a discount on their transportation, and when I told him that we didn't have any discounts, that we would be familiar with any brochures or anything put out by American Airlines, and that we had not had any, he argued, and for quite some time, and went away and made a telephone call to his office and then said the slips of paper had said
239 "North American Airlines."

We had several instances after that where they came in with the Buyers' League book for discounts.

Q. Did other instances involving confusion between American and North American occur while you were at Burbank?

A. All types of confusion would occur. Well, for instance, if we were on the morning schedule at the terminal, people would check—this is not, by the way, at this position, where our counter is located now, it was when we were in view of the center of the terminal—I have been gone since the counter was moved—where, when the inbound flights would be coming in, we would get practically all the morning inquiries on the arrival of the flights, which couldn't all be pinned to North American unless they gave us a flight number, but they were checking for the arrival of the American ships and we would tell them our ships wouldn't arrive there.

At the terminal switchboard, where we answered our phone, American Airlines, we got the same inquiries on the phone.

Q. Did you ever have passengers arriving on North

American flights attempt to retrieve checked baggage from American?

A. Yes, sir.

240 Q. Do you know how often these incidents occurred?

A. I would say daily on each one of these instances, at one time or another during the day.

Q. How was mail addressed to American while you were at Burbank; that is, to the Burbank ticket office of American?

A. Most always addressed to the company, and not to us individually.

Q. It would be addressed to American at——

A. American Airlines, Lockheed Air Terminal, Burbank, and very occasionally it might come in an individual's name, but not most of the time.

Q. Did you have any experience with misdirected mail while working at Burbank?

A. Mail addressed to American Airlines, when the contents belonged to North American Airlines, and also our mail addressed to North American Airlines was delivered to North American Airlines.

Q. Would this happen occasionally, or regularly, or frequently, or infrequently?

A. I would say possibly I handled six to twelve envelopes where they came in addressed to us.

Q. That is, they would be addressed to American Airlines at Lockheed Air Terminal?

A. On the outside of the envelope.

Q. And what was the nature of the content of these 241 letters which you discovered were not to American?

A. One specific one was a hotel bill from Kansas City that was addressed to us, where North American had hotelled their passengers, and the bill came to us. When I checked with them they said "Yes, it was theirs."

I had one inquiry as to a refund which I gave one of their agents since it was one of their passengers, and others, I don't remember the contents of them.

242 Q. That is you don't remember the specific contents?

A. No, sir.

Q. Did you ever have personal mail addressed to you that was delivered to North American while you were at Burbank?

The Witness: Our pay checks are addressed to American Airlines. They come out of our New York office and then they are addressed under American Airlines to the managers of the offices, and then our Lockheed Air Terminal address. They went to North American.

Q. Was this one time, or more than once, that something of this sort occurred?

A. That is the one that stands out in my mind. Whether other mail was brought over to us—I think at times our mail was dropped on their counter, because post office delivered to both the offices and to the counters in the terminal.

Q. Why does that particular incident stand out in your mind?

A. I believe it was three or four weeks before we got the letter.

Q. Is there a further factor involved there, as well as the fact that the letter was delivered to North American?

A. In that their chief pilot was named Jim Newkirk.

Q. Is it your understanding he was out of town at the time?

A. Yes, Captain Newkirk was out of town at the time. I think the letter had gotten waylaid on his desk.

Q. But the letter did say on it, "American Airlines," and then under that, your name?

A. My name.

Q. Now Miss Newkirk, you were at Burbank since prior to the first of January, 1951; isn't that correct?

A. Yes.

248 Cross-examination.

By Mr. Maclay:

Q. What is the comparative size of American Airlines ticket counter there, compared with other ticket counters in the terminal?

A. Now or before?

Q. Well, both.

A. Well, before, I would say it was approximately the size of all the counters with the exception of Western and United. Now I would say it is about——

Q. Were they larger or smaller?

A. Western and United were larger.

Q. And now?

A. About a third, or a little bit better than a third.

Q. And now the situation?

A. About a third as large.

Q. Yours is about a third as large?

A. That is right.

Q. As all of the others?

A. They are not all the same size. Western and United have very large counters, and all the rest of them run about two-thirds as large as theirs, and we are about half the size of the smaller counters.

250 Q. Burbank is principally a non-scheduled air line terminal, isn't it?

A. Oh, no. United and Western and TWA are in there.

Q. Well, isn't there a great deal of non-scheduled transportation going in and out of Burbank?

A. All of them that operate from the West Coast go from there, from that area. They don't use any other field.

252 Q. Were there instances of your mail being misdelivered to North American?

A. Other than the check I can't think of any specific instance. There possibly were.

Q. So far as you know there was just one instance of that?

A. That is. I would say one that we would definitely recall, yes.

Q. So far as you know there was only one, right?

A. No, I wouldn't say that. Possibly mail went to their counter, where their agent would bring it over. I wouldn't make a mental note on it.

Q. I mean you don't know about it?

253 A. I would say yes, there were instances, if I had to think back and trace them possibly, yes. I wouldn't know what the contents were.

Q. But you don't know of any instances now, other than the check, is that right?

A. I would say there were instances when our mail went to their counter, yes.

Q. But you don't know of any?

A. Yes, I am saying there are.

Q. Well now, you are saying there are?

A. There are instances.

Q. All right.

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260 Direct examination.

By Mr. Stratton:

Q. Will you give your name and address to the reporter?

A. Corinne Perry, Lockheed Air Terminal, Burbank, Calif.

Q. What is your position with American Airlines?

A. I am a ticket agent in charge of the Burbank office.

Q. How long have you been in charge of the Burbank office?

A. Since January of this year.

Q. Were you an agent at the Burbank office prior to that time?

A. Yes, from October, 1951.

Q. Had you held any previous position with American?

A. Yes, I was in the auditing office from January, 1951.

Q. Miss Perry, I now show you page 18 of Exhibit No.

AA-4, and ask you if that is a copy of an affidavit which you signed?

A. Yes, it is.

Q. Are the matters set forth in there a true and correct statement of your experiences at Burbank?

A. They are.

Q. I now show you the exhibits marked American
261 AA-12A and AA-12B, being tickets of North American Airlines. Is that the type of ticket that was used by passengers who attempted to check in at the American Airlines' ticket counter referred to in the next-to-the-last paragraph of your affidavit?

A. Yes, they are. They would come to the counter with these tickets in their hands and present them to me to attempt to check in for a 9:30 flight. I would take one look at them and say "This is American Airlines." They would stand right there at the counter, they would look at the American Airlines' sign right above our counter, and say "Yes, I know it is."

Q. Turning to page 28 of Exhibit No. AA-4, is that a copy of a report which you filled in and sent to Mr. Burg?

A. Yes, it is.

Q. Is it a true and correct statement of what happened on that occasion?

A. It is.

Q. Turning to page 33 of Exhibit No. AA-4, is that also a copy of a report which you sent to Mr. Burg?

A. That is.

Q. Is that a true and correct statement of your experience on that occasion?

A. It is.

Q. Is it your understanding that North American Airlines has an office in Santa Monica?

262 A. It is.

Q. Now, referring again to the passengers checking in, how frequently has that occurred, in your experience—that is, passengers attempting to check in at your counter on North American tickets?

A. I would say it was nightly occurrence, when we had our counters more in the center of the terminal.

Q. Do you continue to have passengers checking in since the American counter is in the wing of the terminal rather than in the center?

A. Yes, we do.

Q. While you were working in auditing for American, did you encounter any instances of confusion between American and North American?

A. Yes, I did. On several occasions I had hotels calling up inquiring with regard to the method of billing American Airlines for the crews that were staying at the hotels, and on further inquiry was found that they were referring to North American crews.

Q. What was the nature of the inquiry from the hotel? Was this while the crews were still at the hotel or after they had left?

A. They were still at the hotel.

Q. Have you had experience with passengers inquiring as to American's "Fly Now—Pay Later" plan?

263 A. Yes, I have had many inquiries.

Q. Does American Airlines have a "Fly Now—Pay Later" plan?

A. No, they do not.

Q. Did such passengers inquire of you under the impression that American did have a "Fly Now—Pay Later" plan?

A. Yes.

Q. Were you able to ascertain why they thought that American had such a plan, when American does not?

A. Yes, I did. They would ask me about this "Fly Now and Pay Later" plan. I would explain to them that we did not have such a plan, and they would then say that—

264 Q. Would you go ahead.

A. —they would say that they had read an advertisement to this effect.

Q. Were you able to determine whose advertisement they had read?

A. I did.

Q. Whose?

A. I determined, from their conversation, that it was North American Airlines.

Q. I now show you the advertisement that has been identified as Exhibit AA-10, being a North American Airlines advertisement from the Los Angeles Times, in November, 1952, and direct your attention to the line appearing about two-thirds of the way down the advertisement, where it says, "Fly Now—Pay Later."

To your knowledge, is that a type of advertisement that is run frequently by North American in the Los Angeles area?

A. Yes, it is.

265 Q. Are you acquainted with Edward McAndrews?
I am.

Q. What do you understand to be his connection with Twentieth Century?

A. I understand that is an executive of Twentieth Century, and that he is also on the ticket counter.

Q. What do you mean when you say Mr. McAndrews is on the ticket counter?

A. He is there every night, checking in the passengers on North American. In fact, I would regard him as a
266 ticket agent.

Q. Do you know whether he also sells tickets for North American?

A. Yes.

Q. That is at the North American Counter?

A. At the North American counter.

Q. Have you ever discussed with Mr. McAndrews confusion between American and North American?

A. Yes, we have. In fact, it was on December 3, 1952, we had this discussion. He made the remark that many times he had passengers coming up to his counter to purchase tickets—

267 A. —and on further conversation, when they mentioned Dallas, Oklahoma City, or Tulsa, he would

realize that they were in fact American Airlines' passengers.

He further went on to say that if they were Chicago or New York passengers he would do everything he could to steal them.

Cross-examination.

By Mr. Maclay:

268 Q. Now, American Airlines is, probably, the best known air line, being the largest and having done a tremendous amount of advertising, and having pressed its name, as the testimony shows, in advertising, it is the best known airline, probably, that operates. Would you say that is correct, in your opinion?

A. Yes, I would.

269 Q. Do you ever have inquiries at your counter of people who have tickets on airlines other than North American or American Airlines?

A. With regard to what?

Q. Transportation matters?

A. I do have inquiries, but not actually pertaining to the actual transportation that they have at that present time.

Q. What kind of inquiries do you have?

A. Usually inquiries as to our service for future reference.

Q. Well, what kind of inquiries do you have that are not entirely as to American Airlines' service, but inquiries of people who want information with respect to air transportation, other than American Airlines, and other than North American?

Mr. Stratton: Would you read that question, please?

(The question was read.)

The Witness: They would be general inquiries of such a nature as to whether there are scheduled flights out of the Burbank Airport for the East.

Q. Is it your testimony that you never have an inquiry of someone who is seeking information with respect to an airline, other than North American, and other than American Airlines, and having to do with their transportation on some other airline?

A. Not when the airline is represented there in the 270 terminal.

Q. You do have inquiries of airlines that are not represented in the terminal?

A. Yes.

Q. Which airlines?

A. Eastern, Capital, Delta, Colonial:

271 Q. But you don't know of any instance in which anyone has inquired at your counter with respect to transportation on an air line other than American and other than North American, where they serve Burbank?

A. The only questions that I might have would be that people would come up to me and ask where is such and such a counter, when they have, perhaps, just at that moment come off a plane, particularly when they come out through the gate right opposite our counter. We are naturally the first person that they see.

Q. Do you have any inquiries of people who are North American passengers, when you are the first person they see coming through the gate?

A. I do. They invariably take one look at the counter and see American Airlines and produce their ticket and say, "I just arrived on"—whatever flight it is that came in, and "I am on the 9:30 flight out tonight."

Q. You say invariably do that. Do you mean every passenger coming through with a North American ticket does that?

A. There are one or two exceptions, but—

Q. Would you say 99 per cent of North American's

passengers coming in go to your ticket office, at the American Airlines counter, present their ticket to you?

A. I wouldn't know what percentage of North American's passengers that would be.

272 Q. What do you mean by "invariably"?

A. By invariably I mean that the passengers with North American tickets, that come to the counter, are under the impression that they are at the correct counter.

Q. But the "invariably" refers to the number of times, or the proportion of the North American passengers that do that. Now by "invariably" do you mean substantially every North American passenger coming in at Burbank makes a mistake and thinks that your counter is North American's?

A. No, I mean by "invariably" that the people who come to my counter—

Examiner Bryan: Don't you mean that all of those coming in the gate next to your counter might stop and inquire from you as to the location of North American, and not all that might be coming in to the airport at Burbank? Is that what you mean?

The Witness: That is what I mean.

Examiner Bryan: That would be coming into that particular gate, through that particular gate, near your location; is that right?

The Witness: Yes.

By Mr. Maclay:

Q. Now you said that people would come up to your counter, and I guess they were people with North American tickets, and you would say to them, "This is North American Airlines," or "This is American Airlines," and
273 they would look at the sign and say "Yes, I know it is."

Would you explain what was the purpose of that statement? I didn't quite understand it. I wish you would explain it.

A. They came up to the counter with North American tickets, like this one, AA-12-A, and with baggage to check in for a flight. They would present me with this ticket, and

I would tell them that they were at the American Airlines counter, and hand them back their ticket, very clearly, so that they could read it, and they would say, "Yes, I know it is, but I want to check in for your 9:30 flight."

Examiner Bryan: They knew that they were talking to someone from American Airlines, and yet they held a ticket on North American?

The Witness: Yes.

By Mr. Delay:

Q. Now, it is true, isn't it, that at American Airlines ticket counter you can buy transportation on American Airlines or any other scheduled air line?

A. Yes.

Q. But you don't sell transportation non-scheduled air lines; is that correct?

A. Yes.

Q. Was it your testimony that nobody ever came to you at the American Airline ticket counter, having to do with transportation on any of the other air lines that are there in the terminal?

A. Not actually, requesting space or reservations.

Q. Did you ever sell at your counter a ticket that had part of the transportation on TWA?

A. Yes.

Q. Did you ever sell a ticket that had part of the transportation on United?

A. Yes.

Q. Northwest?

A. Yes.

Q. Western?

A. Yes.

Q. Is there any scheduled air line over which you have never sold a ticket, at your counter?

A. Possibly.

Q. Now you say that these people would present you with a North American Airlines ticket, and you would say "This is American Airlines" and point to the sign, at the same time showing them their ticket with the name "North American" plainly written on it in very large letters?

A. Yes.

Q. And in answer to your statement that "This is American Airlines," they would say "Yes, I know it is." Is that correct?

A. Yes.

275 Q. And then they would say what?

A. That they wanted to check in for the flight, and when I would explain to them that American Airlines was not the same as North American, they would say "Well, I was under the impression that it was."

Q. Now when you say "they," are there a great many people who specifically said to you, "I was under the impression that American Airlines was North American Airlines"?

A. I have had a great many people say that they were under the impression that they were the same or affiliated company.

Q. Now you had more instances of these various types when your counter was located not in the wing where it is now, but out in the more central area of the terminal. That is correct, is it not?

A. Yes.

Q. Where was North American's counter located at the time that yours was located in the more central area of the terminal? You can show it on the blackboard, if you wish.

A. They were where they are now.

Q. And where were you?

A. Where TWA is.

Q. So you had comparable locations on opposite sides of the main area of the terminal?

A. Yes.

276 Q. Do you know whether any carriers other than North American Airlines have a "fly now, pay later" plan?

A. Not to my knowledge.

Q. How did you happen to know that North American has it?

A. I see the advertisements in the Los Angeles Times every day.

Q. But you have not seen any advertisements of any other air lines as to such a plan?

A. I have not been aware of it.

Q. Is it because you have seen that ad that you refer people who inquire about a "fly now, pay later" plan to North American?

A. Yes, sir.

Q. If someone comes up to your counter and inquires about a "fly now, pay later" plan and mentions nothing about any air line, do you refer them to North American?

A. I wouldn't say that I would refer them immediately, no.

Q. What would you do with them, since you know that, to your knowledge, no other carrier has such a plan, what would you do?

277 A. I would find out exactly where they had heard about it.

Q. Well, what would you say to them?

A. First of all, I would tell them that we do not have such a plan, and I would then ask them where they had heard about it. I would find out that they had read it in the paper.

Q. And what would they have read in the paper, that North American has such a plan?

A. I would assume that they had read North American, and had mistaken it for American.

Q. But they wouldn't tell you that, is that right?

A. They would not tell me that they had read North American.

Q. What would they tell you?

A. They would usually say "I understand American Airlines has a 'fly now, pay later' plan."

Q. And you would say "No, we don't."

A. Yes.

Q. Then what would happen?

A. Sometimes they get indignant, inasmuch as they would claim that we had advertised something that we did not have.

Q. Well, what would you do with them?

A. I would find out what they had read.

Q. And what would they tell you?

A. That they had read in the paper that we had a "fly now, pay later" plan, and I would further ascertain
278 from further conversation, that it was in fact North American that they had read, and had mistaken it for American Airlines, and would then refer them to North American.

Q. So they would tell you that it was North American?

A. They would not tell me that it was North American. They themselves would not mention the word "North."

Q. Well then, if they didn't tell you it was North American you must have told them it was North American, because you referred them to North American?

A. I did.

Q. So you told them it was North American?

A. Yes.

Q. Did you ever make any effort to find out whether any other carrier has a "fly now, pay later" plan?

A. Yes, I have.

Q. And you didn't find that any other carrier has such a plan?

A. No, I don't think so. I won't say that my inquiries were exactly extensive.

Q. Who did you inquire of?

A. I inquired of Air America.

Q. Did they have one?

A. Not that I can recall.

Q. Well you inquired of them. Do you know whether they had one or not, or whether you were told they
279 had one or not as a result of your inquiry?

A. No.

Q. What did they say? Did they say they did not have one? Who did you talk to?

A. I don't recall his name.

Q. What did he tell you?

A. That they did not have.

Q. When was it?

A. Oh, many months ago. I could not give you any definite time.

Q. Would you say a year?

A. Possibly.

Q. More than a year?

A. I don't think so.

Q. Now, more than a year ago, did North American have a "fly now, pay later" plan?

A. Yes, I think they did.

Q. Do you know as of when they put in their "fly now, pay later" plan?

A. No; I don't.

Q. During the past year, though, you have referred all such cases to North American?

A. I have.

Q. Did you inquire of any other air lines as to whether they had a "fly now, pay later" plan?

280 A. U. S. Aircoach.

Q. Did they have one?

A. No.

Q. Who did you talk to?

A. Mr. Hutchinson.

Q. Did you ever inquire of North Star?

A. That is Air America.

Q. It is the same outfit, is it?

A. To my knowledge, it is.

Q. So whatever it is, you inquired as to North Star and Air America?

A. Yes.

281 Q. Well, with respect to this exhibit, AA-4, page 33, apparently you simply assumed that this person was inquiring with respect to North American Airlines?

A. She mentioned the Santa Monica office.

Q. Are there any other air lines with offices in Santa Monica, or air/line ticket agencies?

A. There may be travel agencies, yes.

Q. Travel agencies sell tickets for, usually, a lot of air lines, is that correct?

A. That is right.

Q. Why did you assume, then, that this was the North American Airlines office?

A. For the simple reason that she said "Your Santa

Monica office." Therefore, it would mean that she had called the Santa Monica office of an air line—

Q. Well the "your" would refer to American, wouldn't it?

A. Yes.

282 Q. So that she was not telling you the correct story, apparently, because you know you have no office in Santa Monica?

A. That is right.

Q. Now how did you conclude that she was talking about the North American office?

A. Because I am familiar with the North American office in Santa Monica. I know it, I have seen it many times.

Q. Well, the fact that you are familiar with it, and have seen it, why would that lead you to conclude that she had been talking about the North American office rather than some other office in Santa Monica?

A. Because she mentioned the word "American Airlines."

Q. Well now, when someone mentions the word "American" Airlines to you, does that mean North American?

A. I am with American Airlines, naturally it means American.

Q. Yes. Well then, why did you refer to North American?

A. Because I knew that North American had a Santa Monica office.

Q. But you knew there were other offices in Santa Monica, did you not?

A. To my knowledge, not with the word "American."

Q. So that you assumed that she was confused between North American and American because she inquired of American Airlines with respect to another flight, that you didn't operate?

283 A. That is correct.

Q. She gave you no direct indication that she was thinking of North American? Is that correct?

A. She did give me a telephone number that she had called.

Q. Oh, she did?

A. Yes.

Q. What was the number?

A. All I can tell you is that it had an Exbrook prefix.

Q. It had what?

A. An Exbrook prefix. The actual number I do not remember.

Q. An Exbrook prefix?

A. Yes. That is the Santa Monica area.

Q. The telephone number was the number of North American, was it?

A. It would be with an Exbrook prefix. We don't have any numbers with an Exbrook prefix.

Q. Do you mean all the numbers in Santa Monica with that prefix are North American numbers?

A. No.

Q. Why would you conclude this was a North American number?

A. For the simple reason she was very insistent that she had called our office. The call that she made to me came through the switchboard of the Lockheed Air Terminal, and she would have to ask for American Airlines in order for her call to be put through to our office.

284 Q. Did you check the telephone numbers with the Exbrook prefix?

A. She didn't remember the number. She just told me that the number she called in Santa Monica had an Exbrook prefix.

Q. I see, and from that you concluded that it was North American Airlines?

A. Because the number is very prominent in the yellow pages of the telephone book, which covers the Santa Monica area.

Q. Is there confusion with Air America, too?

A. Yes.

Q. There is confusion?

A. Yes.

Q. Does Air America have an office in Santa Monica, do you know?

A. Not that I am aware of.

Q. Now, referring to Exhibit AA-4, page 28, which is the

report you made, and again the portion that is underlined is the portion that you put in, and the balance of it is in the form that was given to you by American Airlines, in the last sentence you say "The passenger was under the impression she was talking to North American Airlines, and there was definite confusion between the two names."

Can you tell me what happened? How you arrived at the conclusion that she thought she was talking to
285 North American Airlines?

A. We had had the usual conversation about schedules, times of arrival—

Q. Of North American flight?

A. I was talking about American Airlines. What she thought I was talking about, I don't know, at that time, the original conversation.

Q. You didn't know? How did you find out what she thought you were talking about?

A. After I had made the reservation, and had in fact sold her a ticket, she made this comment: "You know, I was told I should not ride American Airlines. That is why I have come to you."

Q. And what connection does that have with North American Airlines?

A. Well, I told her she was on American Airlines.

Q. Yes.

A. Then she seemed very startled and made the comment, "I thought this was North American."

Q. She said she thought it was North American?

A. She made that comment, yes.

Q. You mean she said she thought that your air line, American, was ~~North American Airlines~~?

A. Yes.

Q. And she did not want to ride on American Airlines?

A. Yes, she made that comment in view of the fact
286 of remarks made to her by someone who had had experience with air lines.

Q. With what air lines?

A. She was told American Airlines. However, I have no idea of whether this person meant North American or American. I did not speak to her about it—did not speak to her friend.

Q. Now she wanted to ride on North American Airlines, but she didn't want to ride on American Airlines, is that correct?

A. Because of the report that she had had.

Q. That American Airlines was late on its schedules?

A. About three days, yes.

Q. Well, you concluded from that, then, and I gather this—if I am wrong, correct me—you concluded from that, then, that there was a mistake in the names, and that she was actually referring to North American Airlines as being late three days?

A. I asked her where she had that report that we had ever been as much as three days late in the last few months.

Q. And where did she get the report?

A. From her friend who had purportedly travelled American Airlines.

Q. Her friend had told her American Airlines was late?

A. That is correct.

Q. How did you conclude it was North American?

A. Because she made the comment that she thought she was talking to North American after I had made the
287 reservations.

Q. Did she keep the ticket, and travel?

A. Yes, she did.

Q. Why did she change her mind and decide to go on American instead of North American?

A. I explained to her the difference between the two companies and that satisfied her.

288 Q. Now, referring to Exhibit AA-4, page 18, the paragraph beginning "During the time I have been stationed at Burbank," you say that passengers frequently contact you, asking you what time your flight will arrive in Burbank, and you tell them you don't have a flight arriving at Burbank, and you refer them to North American Airlines. Why do you refer them to North American Airlines?

A. Because, when they come through the terminal switchboard on to your line, they ask for the arrival time of a specific flight.

Q. And you know that that is the flight time of a North American flight?

A. I don't know that it is the flight time, but the flight number.

Q. Do they refer to a North American flight number?

A. They refer—they call me and they ask me what time flight—whatever the number may be—is arriving, and from that flight number I can tell that it is North American.

Q. Do you know the flight numbers of any carriers other than North American and American Airlines?

289 A. Oh, yes.

Q. Do you know them all?

A. I wouldn't know them all off by heart, but I know the service.

Q. Does Air America go into Burbank, or North Star?

A. Yes.

Q. Do you know their flight numbers?

A. I think it is the one hundred series.

Q. One hundred series?

A. Yes, I think so.

Q. Well, one hundred what?

A. That I have never been able to find out. I never discovered which the series is that the final number would be, either coming in or going out, that I have never been able to discover.

Q. So if someone called you and gave you a flight number in the hundred series, that was in fact a flight of Air American or North Star you wouldn't be able to tell them that that was in fact an Air America or North Star flight?

A. Yes, I would.

Q. You would.

A. Yes, but I wouldn't know whether it was eastbound or westbound?

Q. But you do know the numbers of the flight?

A. The beginning number would indicate a North Star flight, yes.

290 Q. Are Air America and North Star the only carriers that have flights in the one hundred series at Burbank?

A. As far as I am aware.

Q. What are the American Airlines flight numbers?

A. They are their flight numbers?

Q. I mean, does an air line, for example, have all of its flight numbers in a certain hundred series, like one hundred or two hundred, or something like that?

A. To my knowledge, yes.

Q. What series is North American?

A. Two hundred.

Q. Two hundred? They are all in the two hundred series?

A. As far as I know, yes.

Q. So that it is only when you get an inquiry in the two hundred series that you refer to North American Airlines?

A. Yes.

292 Q. With reference to what you call here "A. F. L. Buyers' League Skrip Book," and I am referring again to Exhibit AA-4, page 18, what are these A. F. L. skrip books?

A. I never had a very good look at one. I have had one waved in front of my nose.

Q. Do you know who uses them?

A. They are union members who are also members of the Buyers' League, which is apparently quite a select little group, from what I can find out.

Q. A select little group?

A. As far as I know, it is apparently quite difficult to become a member of the Buyers' League.

Q. Now, you say the skrip book is good on North American Airlines?

A. Yes.

Q. Is it good on any other air lines?

A. Is it good on any other air line?

293 Q. Yes.

A. Not on any of the scheduled air lines, no.

Q. Well, is it good on any other air line, scheduled, non-scheduled, or any other air line?

A. As far as I know, no.

Q. Well, how did you find out it was good on North American?

A. From general inquiry.

Q. From whom? Of whom?

A. From people there in the terminal.

Q. Did you inquire as to whether it was good on any other non-scheduled air line?

A. Yes.

Q. What did you find out?

A. No.

Q. Which air line did you inquire with respect to?

A. U. S. Aircoach.

Q. Who else?

A. That was the only one.

Q. You didn't inquire as to Air America?

A. No.

Q. North Star?

A. No.

Q. Or any other carrier?

A. No.

294 Q. Why did you inquire of U. S. Aircoach, and North American, but not of any others?

A. I don't know.

Q. Why do you refer them to North American instead of to U. S. Aircoach?

A. Because U. S. Aircoach does not have that plan.

Q. I see. North American is the only one you found that has it?

A. Yes.

Q. Would you prefer to refer your passengers to North American over Air America and North Star, for example?

A. Exactly what do you mean by that?

Q. Well, you didn't inquire as to whether North Star or Air America uses the skrip book and yet you have people coming up with this skrip and you refer them all to North American?

A. Yes.

Q. Why didn't you inquire of North American—rather of Air America and North Star, and possibly find out if they had the plan, and maybe refer some of them to them. Why did you refer them all to North American?

A. Because it was generally known that North American was the one who honored those. At the time that this was

going on, North Star was not using the phrase "Air American" to the extent that it is now.

295 Q. What difference would the name they use have to do with whom you refer these people to?

A. Because of the confusion with the name, North American and American.

Q. Do you mean because of the confusion which you feel exists in other peoples' minds, when they give you a skrip book you assume they mean North American; is that correct, that they are trying to get a ticket on North American?

A. I know that they are.

Q. How do you know? If all they tell you is they have a skrip book and they want a ticket, how do you know they are after North American?

A. Because North American is the one that I know that honors that A.P.L. Buyers' League skrip.

Q. But you don't know whether other carriers honor it or not?

A. None of the scheduled air lines do. I know that.

Q. Non-scheduled air lines?

A. The non-scheduled air lines, to my knowledge, they don't.

Q. To your knowledge, they do not?

A. As far as I know they do not.

Q. The next paragraph of the same exhibit. These people check in with American, and they are after North American's 9:30 departure. How do you handle those people?

What happens?

296 A. I ascertain, usually by looking at their ticket, as to what air line they should be checking in at.

Q. Did you ever have anyone else come up to your counter and attempt to check in who had a ticket on another air line? Other than North American and American?

A. No.

Q. Never in your entire experience; is that correct?

A. I have no recollection of such a thing happening.

Q. Air America?

A. Only since our counters have been together.

Q. Well, you have had some with Air America, is that right?

A. Recently, yes.

Q. Why did you say "no?" first?

A. You brought that to my attention.

Q. I asked you specifically if there had been another instance when anyone came to your counter to check in with a ticket other than North American Airlines, and you said no. Then you changed your testimony. Now, which is correct?

A. What I last said was correct. I have had Air America. I regret the error.

297 Q. With respect to the reports of inquiry that you have filled out, which are Exhibits AA-4, page 27, and Exhibit AA-4, page 33, when were these forms given to you?

A. In the month of November.

Q. In November?

A. Yes.

Q. What were you told when they were given to you?

A. I was asked to note down instances where there was confusion between American and North American.

Q. And it was instances that had occurred previously, or that occurred at that time, or later?

A. Just during that time.

Q. During which time?

A. During the period covered by these reports here. I think it was about a two-week period.

Q. Just during a two-week period?

A. Just about then, es.

298 Q. Now, I believe you testified that these instances of confusion occurred very frequently, and I think you said, with reference to people coming through the gate there, they would come up to your counter and it occurred invariably—I don't know exactly what you meant, but I assume you meant there were a lot of them. You only turned in two of these reports. Were there other specific instances that you didn't turn in?

A. There were quite a lot.

Q. Why didn't you turn those in, too?

A. I didn't always have the time to do it.

Q. Just a question of time?

A: It was a question of time. We have a lot of other things to do on the counter.

Examiner Bryan: The two that you did turn in were typical of others that you received, but you didn't reduce those to writing, just those two?

The Witness: That is right.

Examiner Bryan: That is representative of a number?

The Witness: Yes.

300 Direct examination.

By Mr Stratton:

Q. Would you give your name and address to the reporter, Miss Rowley.

A. Bonnie Rowley; address, 521 West Sixth Street, Los Angeles.

Q. What is your position with American?

A. I am a reservationist in the telephone sales department.

Q. How long have you been a reservations agent?

A. Two years.

Q. What are your duties as a reservations agent? Brief

A. Making reservations for passengers who call in, planning itineraries, giving flight information, and various other information. Whatever the case may be.

Q. Is this all in response to telephone calls?

A. Yes.

Q. Do you work with a number of other reservations agents?

A. Yes, I do.

Q. And the calls are—well, how does the telephone call get to you, among this group of reservations agents?

A. There is a switchboard, and when an agent is free, the position they are sitting at registers free on the switchboard, and the telephone operator then places another call to them.

Q. Turning to Exhibit No. AA-4, page 10, is that a copy of an affidavit which you signed?

A. It is.

Q. Are the statements there made true and correct, to the best of your knowledge and belief?

A. They are.

Q. Turning to Exhibit AA-4, page 30, is that a copy of a report which you made to Mr. Burg, on a form that had been provided?

A. Yes, it is.

Q. Is it a correct copy of your report?

A. Yes, it is.

Q. And are the statements that you made there true and correct?

A. They are.

Q. In addition to the particular items noted or set forth at pages 10 and 30, which we have just referred to, 302 have you received other telephone calls involving confusion between American and North American?

A. Many.

Q. By "many," how often have you received such calls? Can you place any figure on the frequency?

A. Yes, I would say an average of three or four daily.

Q. Are these two typical or representative of the types of things that are involved in those telephone calls?

A. Yes, they are.

Q. Do you recall any other particular or specific incidents?

A. I can recall many. However, they all follow the same pattern, more or less: Monday before we left to come to Washington I had two, I can recall.

Q. Were they in a similar pattern to these?

A. Similar pattern, yes.

Q. Have you ever discussed the matter of calls involving such confusion with other reservations agents working with you?

A. I wouldn't say we had discussed it, but you can't help but hear, when we are so closely united. There has been some discussion, yes. Because some it has been funny.

Q. Well, from such discussion as you have had, do you

know whether—is it your understanding that the other reservations agents working there received calls of about the same frequency as you do?

303 The Witness: With about the same frequency except for one particular person I remember, who had nine in one day, to the point of being quite annoyed. We were very busy.

Cross-examination.

By Mr. Maclay:

Q. When you referred to the others there, were
304 you referring to the other reservations personnel?

A. Yes, I am.

Q. What office is this at?

A. This is American Airlines' downtown office, 521 West Sixth Street, telephone sales department, reservation department.

Q. In Los Angeles?

A. Yes.

Q. How many of you are there there, reservations people, like yourself?

A. At the present time, I am not sure as to the exact number of agents we do have. It is shift work, of course. At one time, in the room, there were approximately 45 to 50 of us.

Q. Forty-five to fifty at one time?

A. Yes.

Q. Then you have two shifts, three shifts?

A. No, we have—let me explain how this works.

For instance, if you work eight to 4:45, that would be one shift. Another shift would be nine to five forty-five; every hour someone comes in to replace someone else, or two or three people. So at the peak of the day when our business is the heaviest, we have quite a full complement.

Q. Forty-five or fifty then?

A. Yes.

Q. Do you know what the total number of girls
305 is that are employed for this type of work in that office?

A. No, I do not, I am sorry.

Q. How many hours a day—

A. We have 91 in the entire reservations department.

Q. Those are not all reservations agents?

A. No.

Q. Well, can you take out the people who are not reservations agents and come up with a pretty good figure as to the total number of reservations agents?

A. Roughly, I would take twenty out that are not.

Q. That would leave you 71?

A. Yes.

Q. So you think there are, depending on whether each girl has three or four a day, you would say there are between 213 and 284 instances of confusion of North American Airlines' name with yours, per day; is that correct? That is, I multiplied 71 by three and got 213, and multiplied four and got 284.

A. Yes, but you understand that is an average, and a rough average, and also, on a busy day.

Q. Oh, well, you didn't mean they had three or four every day? You said they had three or four daily?

A. I said an average of three or four daily.

Q. Well, then, my figure is accurate, so you say on the average there would be between 213 and 284 instances of this confusion in that office, daily?

306 A. Yes.

Q. How many reports of these incidents did you turn in?

A. I believe I turned in three.

Q. There are just two here, aren't there, pages 10 and 30?

Mr. Stratton: Those are the only ones I know of, Mr. MacClay.

By Mr. MacClay:

Q. Referring to Exhibit AA-4, page 30, had you seen the television broadcast the night before?

A. No, I have never seen North American's television broadcast. I don't have a set.

Q. Do you know whether anyone else has television broadcast advertising air transportation?

A. No, I do not.

Q. Why did you assume this was North American?

A. The word—she had "American Airlines" written down. She also had an \$80 fare, which I know North American has.

Q. That is also the fare of some other non-scheduled carriers, isn't it?

A. It could be, but I didn't know about it.

Q. Well, you know North American's fares but you don't know the fares of any other non-scheduled carriers?

A. No, I don't know the fares of all non-scheduled carriers, I am sorry.

307 Q. But you do know North American's?

A. I know North American's.

Q. You concluded this was North American Airlines' television program because you saw the word "America" on something she had, and you saw the fare and it was \$80, and you knew that was North American's fare?

A. Yes.

Q. Is that correct?

A. That is right.

Q. And you sold her a ticket?

A. Yes.

308 Q. Now, referring to Exhibit AA-4, page 10; you refer there to a flight No. 628 from Miami.

Whose flight is that?

A. Now, I remember this lady very well. We had quite a long conversation.

Q. Just a minute. Do you know whose flight that 628 flight is?

A. No, I don't know whose flight 628 is.

Q. All right, go ahead with what you were going to say.

A. She had received this telegram, as I have stated, and you understand, this is very condensed. We had a long

conversation, which I didn't go into on this—and after she read me the telegram, and so on, I suggested North American Airlines. She evidently called North American Airlines and they had no flight 628. She called back, and whether it was a mistake with the telegram, or whether the passenger was confused, or something, on the flight, I don't know.

Q. Well, why did you refer to North American?

A. Because it followed the same pattern as so many other things. Was American Airlines arriving at Burbank?

Q. And it was Flight 628. Are you familiar with the flight numbers?

309 A. I am not familiar with the flight numbers, no.

This Mrs. Rath turned out to be a very nice person.

Q. Good.

A. She was upset about the whole procedure; I gave her my name, she called me back, after she had contacted North American Airlines, asking them if they had a flight, whatever it was, 628. They did not, and she called them back, and then she finally located her passenger.

Q. What line did the passenger arrive on, do you know, finally?

A. She didn't say. She said—this is the way it went, she said she was going to call back North American. So I said "Fine." Then a little bit later she called me back again, and she said "Yes, you were right, I got hold of her. We met some way." So it was definitely North American Airlines.

Q. So the passenger did come in on North American?

A. The passenger came in on North American Airlines.

310 Do you ever have any calls of people who call American Airlines, and make it clear to you that they want a reservation on some other airline other than American Airlines?

A. I have calls from people that want a cheaper fare than American Airlines offers, yes.

Q. Well, do you have any people who call up, for example,

and tell you they want a reservation, and they think maybe they are talking with T.W.A., or they think they are talking with some other airline?

A. No, I never have passengers call that think they are talking to T.W.A. or United, because they hear the word "American Airlines" twice before they ever get to me.

Q. I see. It goes through a switchboard?

A. That is right. And then we also say it.

Q. Do you ever have any calls where they are asking for reservations on North American Airlines?

A. Not to my knowledge. I can't remember having any.

Q. Referring to Exhibit AA-4, page 30. In that case the woman called and she got through to you, and she requested for information about North American Airlines, and she knew she was after North American Airlines because that is what she told you?

A. No, she did not.

Q. She didn't? Well, she was requesting information about—

A. She was requesting information about North American Airlines, but she was under the impression that it was American Airlines. She was fully aware that she was talking to American Airlines.

Q. I see.

A. That is where the confusion arose.

Q. And the only way she found out that it was North American Airlines that she was probably after was you told her?

A. I told her it was probably North American that she had seen, yes.

315 Direct examination.

By Mr. Stratton:

Q. Would you give your name and address?

A. Arthur B. Thompson, Jr., American Airlines, LaGuardia Field.

Q. What is your position with American Airlines?

A. I am the reservation manager for the New York district.

Q. How long have you held that position?

A. Since September, 1952.

Q. What other positions have you held with American?

A. Previous to that time I was assistant regional manager of reservation and ticket offices, and prior to that I have held supervisory positions in New York reservations.

Q. How long have you been associated with American?

A. About nine and a half years.

Q. Do you sponsor Exhibit No. AA-5?

316 A. I do.

Q. Are the matters set forth in there true and correct copies of the documents they purport to be copies of?

A. Yes, sir; they are.

Q. Now, turning to pages 2 through 5 of Exhibit No. AA-5, were those affidavits prepared under your direction and supervision?

A. Yes, they were.

Q. How did you come to have them prepared?

A. I realized that there was confusion between the name "American Airlines" and "North American," through conversations with the people working for me, and conversations with the district sales manager in New York.

At that time we felt that we should take some sort of a study and we prepared a very simple form to be placed at the position of each agent taking telephone calls, for three days in October.

The instructions were given, by me, to my section head, the supervisor of the sales section, in New York; and she in turn passed the information along to the chief agent, and in turn to the head agent, and the instructions very briefly were such that the reservations agents, we requested them to record any confusion that existed in the telephone calls, as they did their daily work.

Q. Were these affidavits then prepared on the basis of the written reports turned in on these forms by the
317 agents?

A. Yes, they were.

Q. And this was a check which covered a three-day period in October?

A. That is correct.

Q. At whose request did you make that check?

A. At the request of the district sales manager in New York.

Q. Is that Mr. Baker?

A. Mr. Richard Baker.

Q. Turning to pages 6 through 38 of Exhibit AA-5, state the circumstances under which those reports were prepared?

A. At the end of October, we decided to continue the study. At that time we were given, by Mr. Baker, a more elaborate form, and at that time we then requested the people to give the facts as they recorded them. That study lasted from the end of October through the end of December, approximately.

Q. It was about two months?

A. About two months.

Q. And these are copies of the reports that were turned in by reservations personnel under your supervision during that two months' period?

A. Yes, they are.

Q. Have you discussed the matter of confusion between American and North American with reservations agents under your supervision from time to time?

318 A. Somewhat, yes, I have. Most of the discussions, however, have been with the supervisor of the section that is responsible for taking the telephone calls.

Q. Based on those discussions, are these reports representative of the type of calls that are received by your reservations agents?

A. I have examined them, and they are representative of the type of call we receive in American Airlines.

319 Cross-examination.

By Mr. Maclay:

323 Q. Did you ever get any calls where people call American Airlines and they actually want information with respect to other airlines?

A. Yes, we do.

Q. And you get other calls where people are asking
324 you about reservations and various things, on other
airlines, other than North American, and other than
American Airlines?

A. Yes, we do.

329 Q. If some one calls up American Airlines, and gets
you on the phone, and says "Is this North American
330 Airlines?" and you say "No, this is American Air-
lines," and they say "Wrong number," does that
indicate to you some confusion in the mind of the person
calling?

A. Yes, it does.

Q. You mean just by virtue of the fact they got the wrong
number?

A. By virtue of the fact that they wanted to talk to North
American, but evidently looked in the telephone book and
found American Airlines' number.

Q. And got the wrong number? They were after North
American Airlines, and they knew it, but apparently they
got the wrong number?

A. Well, there is a very definite relationship between
getting one airline and wanting to get another. It is not
the simple type of a wrong number. The wrong number,
to my way of thinking, would be wanting to dial Twining
8-5000 and dialing Twining 8-4000.

Q. Somebody could be sitting in his office and tell his
secretary to call North American Airlines, and the secre-
tary could pick up the phone and call American Airlines.
That could be very reasonable, could it not?

A. Yes, sir.

Q. Now, the names are different, but the secretary, being
very familiar with American Airlines, and hearing the word
"American" might pick up the phone and call "American."

Then the fellow would get on the phone and say
331 "Is this North American?" and the answer would
be "No, this is American." He would say "wrong

number." Does that indicate confusion in the public mind between North American and American?

A. Well, to answer the question, it would indicate one of two things to me, confusion between the secretary and the caller or passenger, or confusion between the name American and North American. Which one, I couldn't tell.

334 Direct examination.

By Mr. Stratton:

Q. Would you give your name and address to the reporter, please?

A. Yes, Margery Avery, 11 East 78th Street, New York City.

Q. What is your position with American?

A. Reservations agent.

Q. How long have you been a reservations agent?

A. Eleven months, to be exact.

Q. Did you hold any prior position with American?

A. No, not with American.

Q. Had you had previous experience working for any other airline?

A. Yes, Scandinavian.

335 Q. How long were you with Scandinavian?

A. Just three months, it was temporary, prior to coming to American.

Q. Were you in reservations work there, too?

A. Telephone—switchboard, yes.

Q. Miss Avery, in a normal day, while at work as a reservations agent for American in New York City, how much time is there when you are not actually occupied in answering the telephone, completing reservations, or performing duties that involve telephone calls?

A. None, other than one hour for lunch. None at all. Possibly a ten-minute break in the morning, if it is possible to get out, if we are not too busy.

Q. That is the telephone calls come to you continuously?

A. That is right.

Q. Now, is there an arrangement so that at your position

you can tell whether there are callers waiting to talk to a reservations agent?

A. Very much so, yes.

Q. What is that arrangement? How does that work?

A. Well, it is a lighting system, whereby each passenger as he comes in to the main switchboard downstairs, is put on the rack, and he waits there until the downstairs operator can connect him with the reservations agent.

As soon as our lights show available they put them through to us, but in the meantime they keep us re-
336 minded that there are passengers waiting by the lights on the wall.

Q. How many such lights are there and—

A. Well, I have never counted them. Believe me, they are always there. I think there are between thirty and forty.

Q. During what part of the normal day are there some of those lights burning to indicate calls waiting?

A. Nearly all day. Well, all day. There are times when perhaps they won't all be showing as passengers waiting, but that is very seldom.

Q. Turning to Exhibit AA-5, page 3, is that a copy of an affidavit which you signed?

A. Yes, it is.

Q. Are the statements therein true and correct, to the best of your knowledge and belief?

A. They are; yes, sir.

Q. Now, turning to page 15 of Exhibit AA-5, is that a copy of a report which you made to Mr. Thompson?

A. Yes, it is.

Q. And is page 16 likewise a copy of a report which you prepared for Mr. Thompson, or sent to Mr. Thompson?

A. Yes.

Q. And is page 27 also a copy of such a report?

A. Yes, that is right.

Q. Now, in filling in these reports on the forms that
337 were provided, did you attempt to set down every-
thing that had transpired during the call that you
were making a note of here?

A. No.

Q. What did you attempt to put down?

A. Well, it was specifically announced that we should keep track of North American's call, not any other non-scheduled carrier, just North American, so that is what I endeavored to do here.

There were others, of course, but these were just the North American.

Q. Well, I am thinking now of—well, take the one on page 27 of the exhibit, for example.

A. I have it.

Q. Do you happen to recall how long that conversation lasted with that passenger?

A. This particular conversation, no, but some of them can be quite lengthy.

Q. In view of the other requirements on your time as a reservation agent, would you have had time to have written out every thing that took place during one of such conversations?

A. Oh, no, it wouldn't be possible.

Q. Am I correct in understanding that you simply made a note of the more salient points?

A. That is right.

Q. Have you had other—well, now, on page 27, you 338 refer to a passenger who insisted that American advertised flights to Miami in the newspapers and magazines, and similarly, in the affidavit on page 3, you referred to a passenger who requested information about American's services to Miami. Are these the only calls that you have received involving service by American to Miami, and newspaper advertising of American's service to Miami?

A. No, American's service to Miami, we get lots of them, but these are the specific North American—we get lots of calls asking for American's service to Miami, but they didn't ask me about it. They just asked me about North American.

Q. Taking the one on page 27, your note here simply says that the passenger insisted that American advertised flights to Miami in newspapers and magazines.

Now, why did you conclude that that was one that you

should make a note of with respect to North American Airlines?

A. Yes; well, they did come in and ask for our flights to Miami.

Q. Yes.

A. I cannot say if that was the specific instance, but in one of them in particular, I asked them if they were sure it was American Airlines; they said "Yes, you advertised American," and I asked them where they saw it and in what magazine, and she said "Just a minute," and went to look at it, and she said "I am sorry, it is North American.

Would you give me their number?" That was one
339 of them. I am not sure if it was this one or one of these.

Q. About how often do you receive calls which in your opinion reflect confusion on the part of the caller between American and North American?

The Witness: To North American Airlines specifically? Or non-scheduled airlines in general?

By Mr. Stratton:

Q. Well, tell us North American, and then tell us as to non-scheduled airlines generally, if you wish.

340 A. Well, in a week, a five-day week, it will depend largely upon the shift you happen to be working at the time, but in my five-day week I would say an average of ten or twelve calls a week, for non-scheduled airlines, approximately about half of them would be for North American.

Cross-examination.

By Mr. Maclay:

Q. Do you get calls, sometimes, where the person calling wants to get service on American to a point that American does not serve?

A. Yes, we do.

Q. For example, you might get a call asking to take American Airlines from Chicago to New Orleans?

A. Yes.

Q. Do you get a substantial number of such calls, over a period of a week, or pick a number?

A. We do get such calls. I couldn't say how many. We do get them.

341

By Mr. Maclay:

Q. Would you say that, in view of American Airlines' being considered, I think, by a great part of the traveling public probably the top airline, the best known airline, in the United States, that it is more likely that people would call American Airlines for airline information than any other airline?

A. I would like to answer that.

Q. Well, in your work for American, don't you find that there are a reasonable number of calls that you get where the person is seeking airline transportation information?

A. Yes.

Q. If you received a call, and somebody wanted a reservation from New York to Miami, would you conclude from that that he thought that American Airlines was North American Airlines, and that he was confused?

342

A. When they come in and say "I want your flight to Miami," yes.

Q. What if they came in and said "We want your flight from Chicago to Nashville," what would you conclude from that?

A. I don't understand what you are getting at. I am sorry.

Q. Well, if they asked for a New York-Miami flight—

A. Yes.

Q. Your conclusion would be what? I mean would you conclude that that meant that they were confused between North American and American?

A. That depends on his approach, when he comes in on the line. Either he says "Well, I want your flight to Miami, or "Does American Airlines fly to Miami" or "Who does go

to Miami?" It depends entirely upon how the passenger approaches you.

Q. Well, if he said "I want your flight from New York to Miami," would you conclude from that that he was confused between North American Airlines and American Airlines?

A. Well, we would assume he wanted one of the American lines, because we answer the telephone "American Airlines."

Q. One of the American lines, which is that?

A. Well, American to Miami, which is not us, because we don't go to Miami.

Q. Would you assume that he was confused as between National and American Airlines?

343 A. No.

Q. Or Eastern and American Airlines?

A. No, because National doesn't sound like American, neither does Eastern. He definitely wants "American," to Miami, and he says so.

Q. So you conclude that most likely he is confused between North American and American?

A. Well, all that is stuck in his mind is American, whether it is North or what it is American to him.

Q. If he asked for a flight between Chicago and Nashville; would you conclude that he was confused at all, that he was thinking of any other airline particularly, or what would you conclude?

A. I don't quite get what you are getting at there.

Q. Well, apparently the only reason that you reached the conclusion that he is confused between North American and American, on a request for your flight from New York to Miami, is because in your own mind you think he should be confused because the two names are similar?

A. No. When he comes in and says "I want American's flight to Miami," it must be some other American, it is not us, because we don't fly to Miami. He specifically says "American to Miami," as he did in several of these instances.

Q. And he could only be confused as between American Airlines, you feel, and some other carrier that has the name "American" in it; is that what you mean?

344 A. That is right.

Q. Now, if he asked you for American's flight from Atlanta to Nashville—

A. We don't fly that.

Q. No, and you don't fly New York-Miami.

A. That is right.

Q. Now, if he asked for American's flight from Atlanta to Nashville, would you conclude that he is confused as between two airlines?

A. We would say American doesn't fly that route, but that is because he hasn't the knowledge of the airlines between those two points. We do have the knowledge. There is an American line that goes to Miami, with "American" in the name.

Q. And it is on that basis that you conclude that he is confused between the two airlines, in the names of each of which is the word "American"?

A. That is right.

• • • • •
Redirect examination.

By Mr. Stratton:

345 Q. Have you ever had a passenger ask you for American's service between Atlanta and Nashville?

A. No.
• • • • •

Direct examination.

By Mr. Stratton:

Q. Would you give your name and address?

A. Barbara Heide, American Airlines Reservations, LaGuardia Field, Flushing 17, New York.

Q. What is your position with American?

A. Reservations agent.

Q. How long have you been a reservations agent for American?

A. Almost nine months.

Q. Did you hold any other position with American?

A. No, I did not.

Q. Have you previously been employed by any other airline?

346 A. No, I have not.

Q. Turning to page 9 of Exhibit AA-5, is that a copy of a report which you made on the form that was provided by Mr. Thompson?

A. It is.

Q. And is page 11 likewise a copy of a report which you made to Mr. Thompson?

A. It is.

Q. And similar is page 25 of Exhibit No. AA-5 a copy of one of the reports which you filled in?

A. It is.

Q. And is page 30 likewise a copy of one of the reports you made?

A. Yes, it is.

Q. And similarly is page 35 one of the reports you made out?

A. Yes, it is.

Q. And page 38, is that also one of them?

A. Yes, that is correct.

Q. In making out these reports did you attempt to set down everything that had been said, or everything that had occurred, or did you merely make a notation of what seemed to you the more salient points?

A. In some I would say I attempted to set down everything, and in others, involving longer conversations, I attempted to condense them into the more salient features.

347 Q. The statement on page 30, for example, of Exhibit AA-5, is that one where you had a longer conversation.

A. Yes, it is.

Q. About how long was that conversation? If you recall?

A. It is difficult to recall exactly, but I would say between two and three minutes. Perhaps a little longer.

Q. Do each of these reports reflect an incident in which, to the best of your knowledge and belief, the passenger was confused between American and North American Airlines?

A. Well, I would say on the last two, that I don't recall

at the present time whether or not the passenger did mention North American specifically.

Mr. Maclay: Is that pages 35 and 38?

The Witness: Yes, that is correct.

However, on the others, there was, I would say—I would say yes, in answer to your question.

348 Q. In other words, you have no present recollection of these things beyond knowing that they are copies of reports which you made on the forms?

A. On the last two, yes.

Direct examination.

349 By Mr. Stratton:

Q. Miss Rowley, in answer to a question from me this morning as to the frequency of calls involving confusion between American and North American received by you, do you recollect the answer you gave?

A. Yes, I do. I said, on the average, of three or four. I meant to say weekly. Evidently I said daily.

Q. Now, to the extent that the record may show that you said daily rather than weekly, you now wish to correct your testimony; is that correct?

A. Yes.

Q. You intended to say three to four weekly.

A. Weekly.

Q. And that was intended to apply throughout your testimony with respect to that?

A. Yes.

Cross examination.

By Mr. Maclay:

Q. Did that pertain to calls that involved something with respect to North American alone, or non-scheduled airlines generally?

A. I would say North American alone.

350 BARBARA A. HEIDE resumed the witness stand, and was examined and testified as follows:

Cross examination.

Q By Mr. Maclay:

Q. With respect to page 30 of Exhibit AA-5, did you say that you didn't know, in this case, whether the passenger specifically mentioned North American or not?

A. No, I did not.

Q. What was it you said, I didn't understand you.

351 A. In answer to which question?

Q. Well, I thought you said, with respect to page 30, that you didn't know whether—

Mr. Stratton: I think the record will show it was the last two, Mr. Maclay.

Mr. Maclay: Thirty-five and thirty-eight?

Mr. Stratton: Yes.

By Mr. Maclay:

Q. What is the telephone NE-9-9000?

A. According to my information, it is the Port of Authority of New York, and stands for New Town 9-9000.

Q. Referring to page 35, why do you refer them to that number?

A. Because that is the number that I was instructed to give, if a number was requested as a source of information for any non-scheduled airline.

Q. Well, in your own mind, do you tie up this affidavit with North American Airlines—I mean this report of inquiry?

A. At the time I did. What made me at the time, I don't know. I don't recall.

Q. Now, referring to page 38, do you in your own mind tie that one up with North American Airlines?

A. At the time I did.

352 Q. Referring to page 11, did you feel that this person was confused as between North American and American Airlines?

A. Very definitely.

Q. She called and she said "North American?" and you said "No, this is American Airlines," and she says "Is this North American Airlines," and you said "American Airlines, may I help you?" and she said "Wrong number."

Do you conclude from that that she is confused as between American and North American?

A. I do.

Q. Well, she knew which airline she wanted?

A. She wanted North American Airlines, and at the time, it seemed as if she couldn't quite understand that it wasn't the same, and almost was wondering why I couldn't say "North American."

Q. Well, she just had the wrong number, didn't she?

A. She hadn't made a mistake in dialing.

Q. How do you know? I agree with you she probably hadn't. The only point I make is this, that the confusion wasn't in her mind. She apparently had gotten the wrong number. But so far as this person's mind is concerned, do you conclude that she was confused as between American and North American?

A. I do.

Q. Well, if she was confused as between the airlines, why didn't she go ahead and do business with American Airlines?

353 A. Evidently, from the statement "wrong number," the passenger wanted to do business only with North American.

Q. Well, then, she certainly knew the difference?

A. Evidently after I insisted that North American was not American she realized that there was a difference.

Q. Do you have any calls at all where it develops that you would conclude that a person was after some airline other than American or North American?

A. I do.

Q. You do or you don't?

A. Yes, I do.

Q. In some instances, even where the names are not at all the same?

A. Well, there are many instances of calls requesting for information on non-scheduled airlines, and in the majority of cases, either I just don't bother or there hasn't been time to pin the passenger down as to what specific non-scheduled airline he was inquiring about, and I would say that is what happened on pages 35 and 38.

354 MARGERY H. AVERY was recalled as a witness by and on behalf of American Airlines, Inc., and, having been previously sworn, testified further as follows:

Direct examination.

By Mr. Stratton:

Q. Miss Avery, do you recollect having received a call involving North American within the past week?

A. Yes.

Q. Would you tell us about that call, what you remember about it?

A. Yes, it was one evening when I was on the night shift and the passenger wanted American's flight to Miami. Of course, we went through the usual thing, she said "You do go to Miami," she was quite insistent about it, and she said "We heard it on Barry Gray's program, he adver-
355 tises American Airlines to Miami."

Q. Do you know whether American Airlines advertises on Barry Gray's program?

A. Well, at that time I must confess I didn't.

Q. Did you then make some inquiries about it?

A. I did, yes.

Q. And what did you find out?

A. Well, I asked one of the agents in the office who was Barry Gray, and he said that he was a disc jockey, and that he was advertising North American.

356 Direct examination.

By Mr. Stratton:

Q. Would you give your name and address to the reporter?

A. Carolyn Houck.

Q. What is your position with American Airlines?

A. Reservation agent.

Q. In New York?

A. Yes, I am.

Q. How long have you been with American Airlines?

A. Approximately nine months.

Q. Have you been a reservations agent all that time?

A. Yes, I have.

Q. Did you ever work for an airline before?

357 A. No, I have not.

Q. Turning to page 8 of Exhibit 5, is that a copy of a report which you made on one of these forms provided by Mr. Thompson?

A. Yes, it is.

Q. Is it a true and correct copy of that report?

A. Yes, it is.

Q. Turning to page 36 of Exhibit AA-5, is that also a true and correct copy of one of the reports you made out?

A. Yes.

Q. In addition to the two incidents noted on these two reports, have you received other telephone calls involving North American and American, and possible confusion between them?

A. Yes, I had one not so long ago, that rather stuck in my memory.

A man called up and said that he had an air travel card with American, and that there were a few gentlemen there with him and they were having more or less of a discussion, and a five dollar bet. I think it was two against three, two that definitely stated that American Airlines and North American were not affiliated, and the other three insisted that North American and American were affiliated, and so evidently the one gentleman didn't believe it so he also got on the telephone, and I told him that he was definitely mis-

358 taken, that there was absolutely no tie between the two, and he lost five dollars.

Q. You wouldn't say that that was typical of the calls you received, though, would you?

A. No.

Q. Have you had other calls in which there was a discussion as to whether American and North American were affiliated?

A. Yes, I have. Many that I haven't written up.

Q. About how often have you received calls involving North American?

A. Well, on a weekly basis, I would say four to six. Sometimes, as has been stated before, it is more, according to the shift you work.

Cross-examination.

By Mr. Maclay:

Q. The four to six calls is that confined only to calls in which you think North American is involved, or is that call as to non-scheduled carriers generally?

A. The statement that they are non-scheduled is correct. I would say that some of them, I am pretty sure—almost quite sure—that they would be definitely North American.

Q. That is, some of the four to six calls weekly?

A. Yes.

X Q. But some of them are just as to non-scheduled carriers generally?

359 A. Yes, that is right.

Q. Do you feel able to split it up and say how many are probably, in your opinion as to North American, and how many are other than as to North American?

A. I would say about two a week, and three, that I could definitely say were as to North American. Possibly more. Of course, it varies according to what days you are working and what hours you are working.

Q. How do you explain the fact that somebody would call up American Airlines to find out about a non-scheduled car

rier whose name doesn't have the word "American" in it?

A. Are you referring to the—

Q. I mean, you get calls?

A. Yes.

Q. Regarding non-scheduled carriers other than North American?

A. Yes.

Q. I am trying to find out if you have any explanation, from your experience, as to why there would be any such calls?

A. Well, undoubtedly, not knowing the telephone number, I don't know the explanation for it.

Q. Well, now, you have two kinds of calls here that we are talking about. You have calls where North American is involved, and that is a non-scheduled airline. And you have calls where North American Airlines is not involved. But where other non-scheduled airlines are involved.

Why, in your opinion, do you have the calls concerning North American?

A. Is it why do I remember those in particular?

Q. No, what is your explanation as to why these people call American Airlines in regard to North American Airlines?

A. Well, because the name is very similar and through misunderstanding they call us, thinking that, evidently, in some respect, there might be a connection.

363 Direct examination.

By Mr. Stratton:

Q. What is your name and address?

A. Jean Reynolds, American Airlines, LaGuardia Airport.

Q. What is your position with American?

A. Reservation agent.

Q. How long have you been a reservation agent for American?

A. Two years.

Q. Did you hold any other position with American?

A. No.

Q. Have you worked for another airline prior to working with American?

364 A. No.

Q. Turning to page 17 of Exhibit No. AA-5, is that a true and correct copy of a report which you filled in on one of the forms provided by Mr. Thompson?

A. That is right, except that it was a woman I was speaking to.

Q. Did the caller indicate to you why she called you with respect to getting information as to a North American flight grounded in Kansas City?

A. Well, yes, she did call American to find out just what the reason for the flight being grounded in Kansas City, and I did offer to check and I did check, with our flight information department, to make certain as to whether or not it was our flight because I wasn't sure.

So we had no information regarding the flight being grounded in Kansas City. So I wanted to check further for her and I asked if she was sure it was an American Airlines, and she said definitely it was, that her son did call her from Kansas City, so she just couldn't understand why we couldn't give her the information. She did happen to call back a day or so later, and we did discuss it, and I
365 happened to give her my name, and she called me at a later date to tell me that it was North American and that she was sorry to bother us.

Q. Have you received other telephone calls involving confusion between American and North American?

A. Yes, I have received others. I haven't had the time to write them up.

Q. Do you recall the details of any of those telephone calls in particular?

A. Yes, one very much so, a passenger called in and said he was taking such and such a flight out of LaGuardia Airport, could I check and see if it was operating on schedule. I knew that it wasn't an American Airlines' flight, but I

offered to check and see if I could help him out, he was a service man.

I was unable to give him any information whatsoever, so I did happen to ask him if he had a ticket handy, and he said yes, "I do, I will get it for you," and when he got the ticket I said "Could you tell me what airline appears on your ticket?" and he said "Yes, North American," and I said "Well, I am sorry, this is American Airlines," and he said "Are you sure? You are not affiliated with North American?" and I said "No, American is a scheduled airline, and we operate on a very definite schedule."

Q. Do you recall any other calls in particular?

A. Nothing, actually that I could mention really, that I would actually remember.

366 Q. Have you received other calls in addition to the two that you testified about?

A. Oh, yes.

Q. Do you know how often you received such calls?

A. I would say approximately four or five calls a week.

• • • • •
Cross-examination.

By Mr. Maclay:

• • • • •
Q. Well, how would you say the proportion of calls you have involving North American and involving other non-scheduled airlines would compare?

A. We do have quite a few calls from passengers traveling on North American compared to other non-scheduled airlines.

Q. You mean more?

A. Yes.
• • • • •

367 Direct examination.

By Mr. Stratton:

Q. Give your name and address to the reporter.

A. Charles L. Strickler, 100 Park Avenue, New York City.

Q. What is your position with American Airlines?

A. Manager of route development.

374 Q. Mr. Strickler, how were you able to establish the dates on which the two brochures shown in Exhibit AA-9 were distributed?

A. The brochure on page 1 was stapled to a memorandum from American Airlines' district sales manager in Philadelphia, and sent to Mr. Speers. The memorandum was dated March 11, 1952.

The brochure on page 2 was stapled to a memorandum from Mr. King, who is our regional vice-president in
375 the central region, addressed to Mr. Speers, dated February 21, 1951.

Q. Were those two memorandums to which you referred what you might call letters of transmittal accompanying the data? Do you understand my phrase?

A. I understand it, and that is correct.

Q. In the lower righthand corner of the brochure reproduced as Exhibit No. AA-9, page 1, there is the language "Wilton Reynolds revised 6-51." What do you understand that to mean?

A. That appears in the lower lefthand corner.

Q. I am sorry.

A. I understand that to mean the date on which the brochure on page 2 was revised.

Q. And what would you understand that date to be?

A. June of 1951.

Q. At that time—have you examined the operating financial and statistical reports of Twentieth Century, made to the Civil Aeronautics Board, to determine the number of passenger-miles that Twentieth Century had operated as of June, 1951?

A. I have.

Mr. Maclay: Mr. Examiner, I want to object again. This has nothing to do with this case, and obviously American Airlines is trying to get into the matter of the fact that a new carrier, who is operating now, is in some way connected with some prior carrier who had its letter of registration revoked, which I assume will couple up both in the enforcement proceeding and in the non-schedule investigation and it has nothing to do with this case, and I object to the testimony.

Examiner Bryan: I sustain your objection.

377

Mr. Stratton:

At this time I would like to offer in evidence Exhibits AA-8, AA-8A, and AA-9.

Mr. Stratton: Was the ruling on the exhibits?

Examiner Bryan: Exhibit AA-8?

Mr. Stratton: AA-8A, and AA-9.

378 Examiner Bryan: They will not be received in evidence.

Mr. Stratton: I ask that they accompany the record as an offer of proof.

Examiner Bryan: They may accompany the record as an offer of proof.

382 Direct examination.

By Mr. Stratton:

Q. Will you give your name and address to the reporter?

A. Jeffery W. Lewis, 710 14th Street, Northwest, Washington, D. C.

Q. What is your position with American Airlines?

A. Manager of the City Ticket Office in Washington.

Q. How long have you held that position?

A. Since 1947.

Q. In connection with your duties as manager of city ticket offices in Washington, do you approve and authorize the payment of bills for items that have been purchased by or for American in Washington?

A. Well, for or by American in the city ticket offices in Washington.

Q. Do you recall having been billed by a radio and
383 television company here last December?

A. Yes, it was around December 16 or 17 we received—actually, not a bill, we received a telephone call. The way it actually happened was that I was out of the office during the morning on either the 16th or 17th, and my secretary received a telephone call from a Rodgers Radio & Television service. Mr. Rodgers was calling, and was quite upset because we had not paid a bill, I believe it was about \$13. His statement was that he felt a large corporation like American Airlines could pay their bills more promptly. She wasn't familiar—

* * * * *

384 By Mr. Stratton:

Q. Go ahead, Mr. Lewis.

A. She was not familiar with American Airlines, particularly the city ticket offices, having requested any services from this particular company, and she advised him that she would check with the manager, and as a result when I returned to the office I called Mr. Rodgers back, and asked him just who in American Airlines had ordered the material, because to my knowledge, none had been furnished to the city ticket offices.

He said he would have to check with his bookkeeper and call me back, which he did in about a half hour, and was very apologetic saying that the call should have been made to North American Airlines.

Q. Is this the only instance in which a trades person in Washington has billed American or attempted to collect from American a bill payable to or due to North American?

O O

A. No, we had one just within the past week, in which we actually received a bill addressed to American Airlines.

Mr. Maclay: I object to this question and answer on the same grounds.

Examiner Bryan: Overruled. The answer may stand.

Mr. Stratton: I would like to have marked for
385 identification, Mr. Examiner, as American's Exhibit AA-13 a bill, bearing the heading "S. W. Rice Company, and an envelope having the return address of S. W. Rice Company, and postmarked "Washington, D. C., March 10, 1953."

Examiner Bryan: It will be so marked.

Q. Mr. Lewis, I now show you a document, and the envelope that have been marked for identification as Exhibit AA-13, and ask you if that is the bill to which you referred?

A. That is the bill.

Q. That is addressed to American Airlines, Inc., at a street address, 718 14th Street, Northwest. Is that the address of American Airlines' office in this city?

A. No, it is not.

Q. Do you know whose address 718 14th Street is?

A. I believe it is North American's address.

Q. Did you investigate to determine whether that bill should have been sent to American or to North American?

A. Yes, we immediately called the S. W. Rice Company, because, again, there is always a possibility that somewhere else in American Airlines somebody could have ordered tailoring changes, and I wouldn't necessarily be familiar with it, so we called the company as a matter of procedure to find out who had ordered the tailoring changes.

386 We were then informed that they were in error and that it should have been sent to North American Airlines.

Cross-examination.

By Mr. Maclay:

Q. You are manager of the city ticket offices?

A. That is correct.

Q. Do the bills and things that have to be paid to the city ticket office for the city ticket office here come to you?

A. That is correct.

Q. Do you have any other specific instances of this kind?

A. Not of this kind, no.

Q. How long have you been here in this city?

A. 1947 as manager of the ticket offices.

Mr. Stratton: At this time I would like to offer in evidence Exhibit AA-13. Copies of it will be prepared and distributed to the parties at a subsequent date.

387 Examiner Bryan: It will be received in evidence with the understanding that two copies will be furnished for the record, and copies served on all parties.

(The docket heretofore marked No. AA-13 was received into evidence.)

388 Direct examination.

By Mr. Stratton:

Q. Will you give your name and address to the reporter, please?

A. Murton Bush, 59 East Monroe Street, Chicago, Ill.

Q. What is your position with American?

A. Reservations manager at Chicago.

Q. How long have you held that position?

A. That particular position since about two years.

Q. How long have you been employed by American?

A. Thirteen years.

Q. Do you sponsor Exhibit No. AA-6?

A. I do.

Q. Does that exhibit consist of true and correct copies of affidavits?

A. Yes, it does.

Q. Were these affidavits prepared under your direction and supervision?

A. They were prepared under my jurisdiction and supervision, yes.

Q. Referring to pages 2 through 7 of Exhibit AA-6, would you please state the circumstances under which those 389 affidavits were prepared?

A. I was asked by the district sales manager at Chicago, Mr. Fox, to have people under my supervision record for me any instances of apparent confusion on a caller's part or on a part of a person coming into the ticket offices, between the name of American Airlines and North American Airlines.

This I carried to my supervisors, much the same way, asking them to go directly to the reservation agents and ticket agents to prepare for us, just notes on any such confusion.

Q. Were those notes subsequently reduced to affidavit form?

A. Yes, they were.

Q. Now, pages 2 through 7, were those to cover instances occurring within a specific period?

A. Yes, the survey, on those pages, was a three-day survey.

Q. Covering October 23, 24, and 25, of 1952? Is that correct?

A. Yes.

Q. Referring to the remaining pages of the exhibit, starting with page 8, under what circumstances were those affidavits prepared?

A. We made a later survey, and I believe that was for roughly a two-week period, that we actually recorded them and asked the people to submit their comments on notes.

390 Q. Did that cover the period November 3 through November 17, 1952, as set forth in the narrative on the first page of Exhibit AA-6?

A. Yes, that is correct.

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393 Mr. Stratton: Mr. Examiner, during the recess American Airlines agreed to furnish for the record copies in color of pages 8 and 9 and 12 of Exhibit No. AA-1. We also agreed that we will furnish a description of the colors used in the billboards, the outdoor billboards, reproduced at page 13.

We have available for inspection, but cannot furnish for permanent including in the record, the original of pages 14 and 15, which show that that is a black-and-white ad in which a bluish-greenish color was used as the background of the brochure.

We also entered into a stipulation covering Exhibit AA-3, Mr. Examiner. On that basis I would like to now move the introduction in evidence of Exhibits AA-1, AA-2, and AA-3.

Mr. Maclay : To AA-3 there is no objection, Mr. Examiner. To AA-1 there is no objection, the way it has been worked out. To Exhibit AA-2 there is no objection.

Examiner Bryan : Exhibits AA-1, AA-2 will be received in evidence, subject to the remarks made by counsel pertaining to the exhibits, with the understanding that copies have been supplied to the parties and two copies for the official dockets, and it is my understanding that Exhibit

394 AA-3 is included in the stipulation between the parties, which will be submitted for the record before the close of the hearing.

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400 Mr. Stratton: * * * And at this time I would like to read into the record the description of the coloring on the outdoor billboards reproduced as Exhibit AA-1, page 13.

The Los Angeles billboard, appearing as the upper picture reproduced on that page, has at the top the letters "Fly American."

401 These are red-brown letters, with orange neon

tubing around the letters. The letters are 72 inches in height. The body of the billboard measures 21 by 36 feet. The background is white. The lettering "To New York" is in a bright red. The letters "Via DC-6 air tourist service" is blue-green. The legend "\$99 plus tax" is blue-green.

With respect to the Dallas billboard reproduced as the lower of the two pictures on that page, the background of that billboard is "graded blue."

The legend "Finest to Chicago" is white. The legend "American" is lemon-yellow. The legend "Two non-stop DC-6 flagships," and so forth, is in a light blue. The dimension of the copy area on the billboard is 17 by 53 feet.

Mr. Maclay : I have no objection.

416-417 Examiner Bryan: * * * So I guess it is the best evidence that we have available and it will be received in evidence for what it is worth. That is American Airlines' Exhibit 4, 5, and 6.

EARNEST LEGENDRE, was called as a witness for and on behalf of North American Airlines, and having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Maclay:

Q. Will you state your name?

A. Earnest Legendre.

418 Q. And your position with North American Airlines?

A. Counter agent, in Burbank.

Q. How long have you been with North American Airlines Agency Corporation?

A. Two years in April.

Q. Do you sell tickets for North American Airlines?

A. Yes, sir I do.

Q. Do you ever have any persons make requests of you for issuance of tickets on American Airlines?

A. I have had one occasion; very lately.

Q. Could you tell us about it?

A. This gentleman came up to the counter to pick up a reservation. The normal procedure is to call our
419 space control and confirm the space before we sell the ticket. Now, before I had a chance to do that he told me the departure was 11:55, and I immediately assumed that it must be American Airlines.

Q. Does American have a departure at 11:55 from Burbank?

A. To my knowledge, yes, not at Burbank, no, but at Inglewood.

Q. Inglewood?

A. Yes.

Q. Where is that?

A. The other side of town.

Q. In Los Angeles?

A. Yes.

420 Q. Do you have inquiries at your counter as to where other ticket counters are located in the terminal?

A. Every day, yes.

Q. At what times are North American Airlines' flights made up? What time do they leave Burbank?

A. 9:30 in the evening.

Q. What time do your flights come in?

A. Usually about nine in the morning.

Q. Have you had instances where people come to your counter and ask for information regarding an American Airlines' flight?

A. Only in the case of weather operation, whereby Los Angeles Airport would be closed, and it is necessary for all carriers to land at Burbank.

Q. In that situation, do you have people come to your counter and request information on American Airlines' flights?

A. Only if they land at the south concourse. We are the first counter at the entrance there.

Q. Do you have people come to your counter and ask you to give them information with respect to the flights of other carriers at Burbank?

A. Do you mean in the case of weather operation, or normal operation?

Q. Any time?

A. Yes.

421 Q. What carriers have been involved in questions that have been asked you by members of the public with respect to information concerning flights?

A. All of them. Not concerning flights, mainly, but the location of their counters.

Q. Is there any particular carrier with respect to which you receive more questions than others?

A. I might say United.

Q. Do you have any explanation as to why you receive more inquiries with respect to United?

A. Well, they seem to have more frequent flights than anyone else, out of Burbank.

Q. To your knowledge, who has the most flights in and out of Burbank, daily?

A. United.

Q. Who is second, do you know?

A. Well, that would depend if it was transcontinentally or local.

Q. Well, let's take transcontinentally first.

A. Until the first of March, we had more frequent service transcontinentally.

Q. Do you mean second to United? Do you mean they had the most, and you had the next most?

A. We had the most.

Q. You had the most?

422

A. Yes.

424 Q. Are there frequent instances where someone comes to your counter, and they are meeting passengers, and they don't have the full information as to the flight number or the carrier on which the person is supposed to be coming in?

A. That is very frequent, daily.

Q. Do people come to your counter and say "So and so is coming in on Flight 602," or some such number, and that is all the information they have?

A. That is right.

Q. Are there instances where someone comes to your counter and says "I am meeting someone who is coming in at 9:30, and I don't know what carrier he is on."

A. That is very frequently, yes.

427 Q. If the person would call the switchboard—if you know the answer to this from your experience there—if the person would call the terminal switchboard and simply give a flight time, do you know how the switchboard would handle that?

A. Well, she will call the counter and find out.

Q. Whose counter?

A. All the counters, if she has to. Now, I have not visited the switchboard, I never was in there, but I assume, or I might assume, that they have information at the switchboard there. On the other hand, it may be that they are too busy, and they will refer them immediately to the air line that is asked for.

Q. Do you get frequent calls over the terminal switchboard, which really should have been referred to other carriers?

A. Not frequently, no.

Q. Do you get such calls over your own private telephone line? Do you get many of those?

A. No, we wouldn't get them over our own line, that is to say, not at the counter phone.

Q. Do you get calls from people who want to purchase transportation to points that you don't serve?

A. Yes, sir, we do.

Q. Do you get a great many of those, or a few?

A. A good number.

428 Q. Is North Star the same as or associated with, or is tied up in your mind at all with Air America?

A. Yes, I know that they are.

Q. Do they do advertising under the name "Air America"?

429 A. Yes, lately. I don't know when I have last heard North Star on the radio, but I have heard Air America.

Q. Does Skycoach advertise?

A. Yes, sir, as Skycoach. Skycoach advertises as Skycoach Agency.

Q. Do you know whether there are any independent agencies other than Skycoach, or the ones you mentioned, who furnish free ticket deliveries?

A. Yes, sir.

Q. Do they advertise that they do so?

A. In the newspapers, yes.

Q. Are there quite a few of those, do you know?

A. Not too many, but there are some.

Q. Do you know whether there are air carriers other than North American Airlines, and whether there are ticket agencies other than North American Agency Corporation, which advertise fares to Chicago in the newspapers and on the radio which are less than American Airlines' fares?

A. Yes. \$80 to New York and \$70 to Chicago.

Q. Are there several such agencies and carriers, which advertise those fares?

A. I would say all independent carriers and their agents, and sub-agencies.

Q. Do you happen to know the names of any of them that do advertise lower fares than American Airlines' fares?

430 A. Carriers or the agents?

Q. Either or both?

A. Well, I know North Star does, or Air America. Also Skycoach, Inc. And the agents, I have never heard them advertise on the radio.

Q. But they do in the newspapers?

A. They do in the newspapers.

Q. Do you have a "fly now and pay later" plan?

A. The Los Angeles office does, yes.

Q. Do you know whether any other carriers or agencies advertise a "fly now, Pay later" plan?

A: I am sure North Star does. I wouldn't swear to it, but I feel almost confident.

Q: Do you mean that North Star does or that others do?

A: That North Star does.

431 Q: Do you have any knowledge of an A. F. L. Buyers' League scrip book? Do you recognize these scrip books for transportation, or whatever it is?

A: Well, I haven't seen a scrip book.

Q: Do you recognize something having to do with the A. F. L., cards or something like that, for some purpose in buying tickets?

A: There is the membership card. I have seen it on a few occasions.

Q: Do you know whether any other carrier or carriers or ticket agencies recognize that similarly?

432 A: Well, we borrowed the idea from North Star.

Q: They originated the idea?

A: That is right. I won't say they originated the idea, but they had it before we did.

433 Q: Will you refer to American's Exhibit AA-4, page 22? In that exhibit, the person signing that report is an American Airlines' ticket agent, and in that report she says that the person who came to her counter said "I was told downtown to check with you about Flight 101 to New York, handing me a flight envelope, of North American."

Do you have similar instances to that, where the person will come to your counter and tell you that they are checking on the flight, and give you a number of a flight of some other carrier—that is other than North American, and other than American—and hand you a flight envelope, for example, TWA or United or Skycoach, or some other carrier?

A: That is just about a daily occurrence.

Q: Can you state whether there are more or less of

those for any certain carrier, like you have more of
434 United or more of TWA or more of Skycoach, or
more of American? Can you give us some idea of
how they break down?

A. We have quite a few of North Star. Again I will say
that the independent carriers are the only ones going east
out of Burbank at that time, with the exception of United.
They leave at six o'clock, if I understand correctly. So it
would be hardly one of the major air lines.

Quite a few check in for a flight to Seattle or San Fran-
cisco, and so on and so forth, belonging to other air lines.

Q. And they come to your counter?

A. Yes, sir.

Q. ~~What carriers?~~

A. All of them.

Q. You mean scheduled and non-scheduled.

A. Yes, sir.

Q. And they come there, to North American Airlines'
counter?

A. That is right.

Q. How long have you been working at Lockheed Termi-
nal for North American Agency, Inc.?

A. Two years.

437 Q. Do you know whether North American Airlines,
or North American Agency Corporation, or North
American Aircoach Systems, has an office in Santa Monica,
California?

A. I don't know of any there, no. I am sure we don't.

Q. Do you know whether there are other ticket agencies,
with office at Santa Monica?

438 A. I am sure there is.

Cross examination.

By Mr. Stratton:

457

Q. When a passenger comes up to you and asks "When do you have a flight to Chicago" do you ever ask him what airline he wants?

A. He will tell me, because if he is looking for an airline, I would say, 99 out of a hundred, I have a reservation, which is very important to him.

Q. I am not talking about a customer who comes in and does not have a reservation.

A. I won't ask him that.

Q. So that, you would have no way of determining whether he thought he was talking to American Airlines or to North American Airlines, or to any other airline.
458 if he started the conversation by asking the question I just asked you?

A. Well, those people coming to the airport for space don't necessarily come first to North American. They will shop around. I have seen them do it dozens of times. It so happens that I feel we have better service, in the way of coach business, out of Burbank, and that is quite a selling point.

463 Q. Did I understand you to say that North American does not have a ticket office in Santa Monica?

A. That is right.

Q. Then why does the March, 1953, Santa Monica telephone directory contain a quarter-page advertisement for a North American Airlines ticket office located at 215 Wilshire Boulevard, in Santa Monica, with the telephone
464 number, Exbrook 36791?

A. That no doubt was put out by a sub-agency; without question it was.

Q. Are you familiar with North American's telephone book advertising in Los Angeles?

A. No, I am not.

Q. Have you ever looked in the yellow pages of the Los Angeles telephone book?

A. I haven't any reasons to, no, except for a cab, maybe.

Mr. Stratton: I would like to have marked for identification as American's Exhibit AA-15, page 62 of the Los

Angeles, classified section, yellow pages, for August, 1952, bearing two ads of North American Airlines.

Examiner Bryan: It will be marked.

(The document referred to was marked American Airlines Exhibit AA-15 for identification.)

By Mr. Stratton:

Q. I now show you that, Mr. Witness, and ask you if you have ever seen those ads of North American Airlines before?

A. I have seen the composition; but not necessary the phone numbers.

Q. Would you say that those are advertisements of North American Airlines or advertisements put out by some sub-agent?

A. I am not familiar with that Gladstone number.

Q. If I were to tell you that the Santa Monica phone book contains, for March, 1953, that is, contains, 465 an ad similar in format to that, but giving an address and telephone number in Santa Monica, and saying, on a line near the bottom, "North American Aircoach Systems, Inc.," would you regard that as an ad of North American Airlines or as an ad put out by some sub-agent of North American Airlines?

A. In Santa Monica I would say it is a sub-agent, probably with permission to use our name. We don't have an office there.

Q. But there is someone, then, in Santa Monica, who advertises using North American Airlines' ad, in the same form as used in the Los Angeles phone book, but that must be a sub-agent, is that your testimony?

A. Well, I won't put it that way. Now, since North American is a good selling point they could feature North American and also they include some place on there that they sell on all air lines. That is why I say it is a sub-agent. They are all independents. But since North American is the best selling, naturally, they want to attract the passenger's attention.

Q. Do you think a passenger that went to that office would think it was an office of North American Airlines?

A. That depends on how the office has been decorated. I don't know.

Q. Do you think a passenger who read that advertisement in the phone book and then called on the phone, would 466 think he was talking to an office of North American Airlines?

A. He would know he is talking to a representative of North American, not necessarily an office, because if that agent in Santa Monica wants to feature, or dwell on North American, rather than the others, well, all good and well. It is a source of passengers.

Q. Is it customary for North American's sub-agents to advertise in the name "North American Airlines" with an advertisement that also says "North American Aircoach System, Inc.," on it?

A. That I wouldn't know, since I don't have that knowledge. I wouldn't be able to answer it.

Mr. Stratton: Mr. Examiner, copies of the Santa Monica telephone directory for March, 1953, and March, 1953, are available in the Department of Commerce library in this building, on the seventh floor, where I examined them during the luncheon recess, and found the advertisement to which I have referred, and a telephone book listing in the white or alphabetical section of the phone book for North American Airlines, containing the same address, and the same telephone number to which I referred previously.

The librarian will not, unfortunately, permit us to remove those books from the library for production at this hearing. I would like to request a five-minute recess so that the 467 Examiner can examine the books in the library, if he so desires, and also I would like permission to reproduce the advertisements to which I refer, in the Santa Monica telephone directory, as supplemental exhibits to be distributed with our other additional material after the end of the proceeding.

Examiner Bryan: You are referring to your exhibit which has been marked AA-15?

Mr. Stratton: No, this is a Los Angeles Advertisement. I am referring to the Santa Monica advertisement, which appears in the Santa Monica telephone directory, to which I have referred. I would like to reproduce that.

Examiner Bryan: You can reproduce that and submit it as a late exhibit.

Mr. Stratton: All right.

Examiner Bryan: That will be marked Exhibit AA-16 and will be due within ten days after the close of the hearing.

* * * * *

472 Direct examination.

By Mr. Maclay:

Q. Will you state your name, please?

A. Joseph Cassidy.

Q. By whom are you employed?

A. North American Airlines Agency Corporation.

Q. How long have you been employed by them?

A. Approximately two years and nine months.

Q. Where are you employed now?

A. 718—14th Street, Northwest, Washington, D. C.

Q. How long have you been employed in Washington?

A. Since January 1st.

Q. Prior to that time where were you employed?

A. I was employed at 726 Broad Street, in Newark, New Jersey.

Q. How long were you employed there?

A. Eighteen months.

Q. Back to what date? Approximately?

A. From June, 1951, to December, 1952.

Q. Prior to that time, where were you employed?

A. North American Airlines Agency Corporation, New York City, 152 West 42nd Street.

* * * * *

476 Q. Do you know on this particular record whether that particular one is being used now?

A. No, I don't, but I can say this: that that same record—for instance, we started in Washington, D. C., we would take the same record and all we would dub in would be the new phone number and the new price. So I would say the same record would be used all over at any time.

* * * * *

477 Examiner Bryan: The record will show that counsel for North American will furnish the date on which the recordings were made. And that will be included in Exhibit NAA-17, these recordings, and NAA-17 will be received in evidence, with the same ruling as before, to be withdrawn and with the understanding that they will be withdrawn at any time that the Board may request.

* * * * *

478 Q. Do you have any persons come into your office and ask for information on American Airlines, or other airlines?

A. Yes.

Q. Do you ever have people come into your office and request refunds on tickets, and hand you a ticket that is not a ticket on one of the carriers for whom you have sold the ticket?

A. No.

Q. Did you ever have anyone come into your office and request information with respect to flights of other air carriers?

A. Yes.

Q. Do they follow any pattern? Are there more of any particular carrier than another?

A. No more than any other. They run just about the same.

Q. Do you have, for example, requests for information with respect to TWA, North Star, American Airlines?

A. Yes.

Q. And others similarly?

A. Yes.

Q. When you have inquiries, generally, about air transportation, and someone wants to go to a point that is not served by one of the carriers that you represent, how do you handle that sort of a case?

479 A. I look up the airline guide, and if there is more than one airline going to that particular point, I name the airlines involved. If there is only one, I direct the request to that address or give him the phone number of that particular airline.

Q. Do you sell tickets on quite a few different carriers?

A. Independent carriers, yes, sir.

Q. If you have someone come into your office, here in Washington, who wants to go from Washington to the West Coast, do any of the carriers that you represent, independent carriers, operate from here to the West Coast?

A. Yes, they do.

Q. Do you sell transportation from here to the West Coast?

A. Yes.

Q. Direct?

A. Yes.

Q. Do you ever sell transportation from here to the West Coast via New York?

A. Yes.

Q. How do you handle that sort of a situation?

A. I send them to New York via Eastern Airlines.

Q. How do you do that? Do you get them a ticket on Eastern?

A. Yes, I already have a stock of thirty Eastern Airline tickets which I purchase in advance, open dates.
480 I usually put them on a flight leaving at five p. m., arriving at New York at around 6:10.

Q. Do you also put some of your passengers on American Airlines to New York?

A. Yes, I do, with Eastern Airline tickets.

Q. That is, you use the Eastern stock?

A. That is right.

Q. Do you have instances where people come to your ticket office—and each time I am referring to all three of the places where you have worked—do you have instances where people come in and they are after generally information about air transportation?

A. Yes, sir.

Q. Do you have instances where you conclude, from what is said by a person coming into your office, instances where you conclude that they are actually confused between the name North American and the name American?

The Witness: No. People who have come in have been confused—people who were booked to fly on TWA or on Canal, or on a lot of other airlines, including American, too, but never one that said that the name has confused them.

482 A. Yes. TWA advertises lower than American. \$98. Skycoach, North Star, Peninsular.

Q. Are there any other companies that you know of that used radio advertising in advertising Aircoach operations?

A. North Star, Skycoach, Eastern Airlines. That is about all I remember.

Q. Do you know of any other carriers or agencies that used television as a vehicle for advertising aircoach operations?

A. Capital uses it. Pan American—they have no aircoach. They go overseas.

Q. Did you say Pan American has no aircoach overseas?

A. No, I don't think they have aircoach. Well, they are overseas anyway, not domestic.

Q. Do you know whether they do any advertising on TV or radio?

A. They are on TV, but I don't know what the ad consists of. I just saw it once.

Q. Do you ever have calls come into your office from people inquiring as to why flights coming in, either here or at New York, are late?

A. Yes.

Q. Do you have calls why they don't know which carrier the flight is on, that they are inquiring about, but they are inquiring, without knowing the name of the carrier, why a certain flight is late, for example, why the 9:30 flight is late, or something like that?

483

A. Yes, rarely, but I do.

Q. Are those instances confined to flights that actually are American Airlines', or do they just have a general pattern of any airline?

A. Any airline.

Q. Do you know the flight numbers of North American Airlines' flights?

A. Yes.

Q. What are those? The transcontinental flights, particularly.

A. 101, 102, 103, 201, 202, 203, and extra sections, 204, 205.

Q. What are the flight numbers; Miami flights?

A. 301, southbound; 401 northbound.

Q. Do you have flight numbers for points that you serve on a less frequent basis than those points are served?

A. No, those are the points that we serve. For instance, Flight 201 will set down in Chicago, and leave from Chicago still as Flight 201.

517 Direct examination.

By Mr. Maclay:

Q. Will you state your name, please?

A. Maureen Porter.

Q. By whom are you employed?

A. North American Airlines Agency Corporation.

Q. Where?

A. 718 Fourteenth Street, Northwest, Washington, D. C.

Q. How long have you been employed there?

A. In Washington, since January 12. Previous to that, in the Newark office.

Q. Of North American Airlines Agency Corporation?

A. That is right.

Q. How long were you there?

A. Approximately two years.

Q. What is the position you hold?

A. Reservationist.

518 Q. Do you have instances where people come into your office and appear to you to be confused as to what office they are in?

A. There is only one particular instance, and that is

since I have been in the Washington area, where one passenger did come into the office holding an American Airlines ticket:

Q. When was that?

A. About two weeks ago.

Q. And what happened?

A. Well, he did have some luggage with him, and he had just stepped out of a cab, and straight into the store, and he said "I believe I am leaving on such and such a flight," and mentioned the number and he had the ticket in his hand. And I said, "May I see the ticket," and I looked and I said "no, that is an American Airlines flight, and their store is right down the street," and I directed him where to go. That was all.

Q. Where is the American Airlines office, from your office?

A. I believe it is three stores down.

519 Q. Do you have instances where people call you and want general information on air transportation, but they don't know what carrier they are after? They want to go to a certain place, for example?

A. Yes.

Q. And if none of the air lines for which you regularly sell transportation go to those points, what do you tell them?

A. We will direct them to the air line that can service them.

Q. Do you have an official air line guide in your office?

A. Yes, we refer to that, and then mention whichever air lines or air line goes to the point to which they want to go.

Q. Did you ever have an instance where a person who came into your office with a ticket on some other air line, or a ticket on some air line other than any of the ones for which you normally sell, or a ticket which you did not sell, and ask you for a refund on it?

A. Yes.

Q. Will you tell me about any such examples. How many of them have there been? Very many?

A. No, very few and far between;

520

Q. Could you give me an example of that?

A. It could have been where they would be from other carriers, just aircoach, without stating any particular name or anything like that, and just then simply having an air coach flight—it could be Skycoach, North Star, Peninsular, any one of those carriers, and I will direct them to the office carried on the ticket.

Q. You will find you will get a lot of inquiries having to do with aircoach matters?

A. Usually, yes.

EXHIBIT No. AA1

531

C. A. B.

Docket Nos. 5774, 5928

Page 1 of 16 Pages

American Airlines, Inc. Advertises American

For more than 20 years, our name has been American. Since 1934, it is American Airlines, Inc. For 4 years before that, it was American Airways, Inc.

In advertising, in publicity, in selling we emphasize the names American and American Airlines. Our purpose is to create in the public mind an identity between the name American and our air transportation services—i. e. to build into the name American what in the law of trade names and trademarks is known as “distinctiveness” or “secondary meaning”.

Such public identification of an airline's name is essential in the highly competitive airline industry.

The following pages include representative samples of the advertising and publicity designed to make the names American and American Airlines distinctive—to build the good will that brings us traffic—first riders, first shippers, repeaters—who know American as “*America's Leading Airline*” and who agree with us:

“Better by Air—

“Best by American”.

Typical newspaper advertising appears at pages 3 through 5 of the Exhibit. Use of the name American alone to identify the services of American Airlines, Inc., is illustrated by (a) the company's newspaper "billboard" advertising campaign which has run continuously since April, 1949 and (b) the "American's Convairs and Coming" campaign of 1948. At the present time, advertisements of the "billboard" type feature the name American alone and appear in 142 newspapers throughout the country with a combined circulation of approximately 28,000,000. On the average, 251 "billboard" ads appear each week. The company has spent in excess of \$2,250,000 for this type of advertisement since the start of the campaign in the spring of 1949.

Magazine advertisements, typical samples of which appear on pages 6 through 9 of the Exhibit, have cost American Airlines approximately \$3,800,000 during the years 1948 through 1952. During these years, many of the company's advertisements appearing in national magazines have featured the name American with an emphasis similar to that employed in the newspaper advertisements.

Company display advertising likewise highlight the name American in city and airport ticket offices and other public places throughout the country. Typical samples are reproduced on pages 10 through 11 of the Exhibit.

Brochures issued by American Airlines similarly frequently feature the name American. Typical samples are reproduced on page 12.

532 *Outdoor billboards*, like the newspaper "billboard" ads, frequently use only the name American in such slogans as "Fly American". Pictures of current outdoor billboards in Los Angeles and Dallas are reproduced on page 13 of the Exhibit. The Dallas billboard has been in use since Dec. 30, 1950 at an average monthly cost of \$185. The Los Angeles billboard is one of two which has been used since May 23, 1950 at an average monthly cost of \$1,500 each.

Such emphasis on the name American has been a company practice for many years. Thus, in 1940, the company produced a sales movie, *The American Way*, which was shown

to hundreds of groups throughout the country. A copy of a brochure used in connection with The American Way is reproduced on pages 14 and 15 of the Exhibit. A photograph of an American Airlines aircraft flying over New York City *circa* 1937-1938 is reproduced at page 16 of the Exhibit with the name American prominently lettered on the fuselage.

Note:

"Pages 122-140 on
next 2 cards"

554 C. A. B.
Docket Nos. 5774, 5928

Exhibit No. AA-2
Page 6 of 12-Pages

Copy

AETNA LIFE INSURANCE COMPANY
Hartford 15, Connecticut
February 26, 1953

R. E. S. Deichler,
Vice President—Sales

American Airlines
100 Park Avenue
New York 17, N. Y.

Dear Mr. Deichler:

Thank you for your February letter enclosing the booklet of listed hotels as well as *American's* Progress Report for 1952.

I have found my air travel card to be very helpful upon several occasions in cashing checks, not only in hotels which are listed in your booklet but in some others as well.

I recently received the credentials, together with membership card, etc., into the 100,000 Miles Club of United Air Lines. You may be interested in learning that a good part of the approximate 125,000 miles I have flown as a passenger on airlines has been with *American*. As a matter of fact, my first flight of any significance was from El Paso to Nashville aboard an *American* sleeper plane in May of 1939.

It is my understanding that you have an honorary organization in *American* known as the Admiral's Club. I would appreciate any information you could give me regarding the qualifications for membership in such an organization.

Sincerely yours, (S.) William H. Holmes, Pension
Trust Supervisor.

emb.

SAMPLE NEWSPAPER ADVERTISING

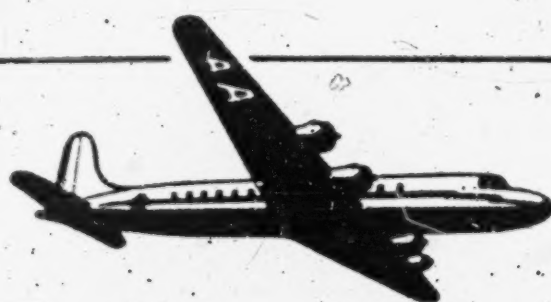


SAMPLE NEWSPAPER ADVERTISING



SAMPLE NEWSPAPER ADVERTISING

American Airlines' low-fare policy is aimed at bringing to more and more people the advantages that only air transportation makes possible. Low fares now apply to travel on American's great new postwar fleet of five-mile-a-minute DC-6 and Convair Flagships, which enable more people to go more places, more often — in greater comfort. This is continuance of American's leadership in bringing to the American public the finest air transportation facilities, the most complete and courteous service — at a cost within easy reach of the average American family.



**Only American offers
the finest air transportation
and this lowest-fare policy:**

- 1. Half fare** for your wife... half fare for your children (21 and under)... when you buy one regular-fare ticket (Mondays, Tuesdays, Wednesdays).
- 2. No extra fare** for luxurious DC-6 service.
- 3. Extra 5% discount** on all regular-fare round trips.

Call American Airlines or your Travel Agent

AMERICAN AIRLINES

Ad 55747—1000 lines (5 cols. x 200 lines).
Newspapers—September 1948

SAMPLE MAGAZINE ADVERTISING



let American plan your transportation!



Enjoy special fare-savings and low-cost tours

LET AMERICAN's experts help make your convention an even bigger success by planning your transportation. In addition, American offers fare savings and low cost Flagship Tours that enable you to tie in a vacation for many dollars less than the usual cost. Or, if you choose, you can visit some friends on the way at no extra fare, thanks to special stop-over and alternate route privileges. So plan to go by Flagship now. You'll arrive sooner, stay longer and enjoy air travel at its finest!

- The Family $\frac{1}{2}$ Fare Plan
- \$59 Sidetrip to Mexico
- Low-cost Flagship Tours
- Group leader of 15 visits Mexico free.

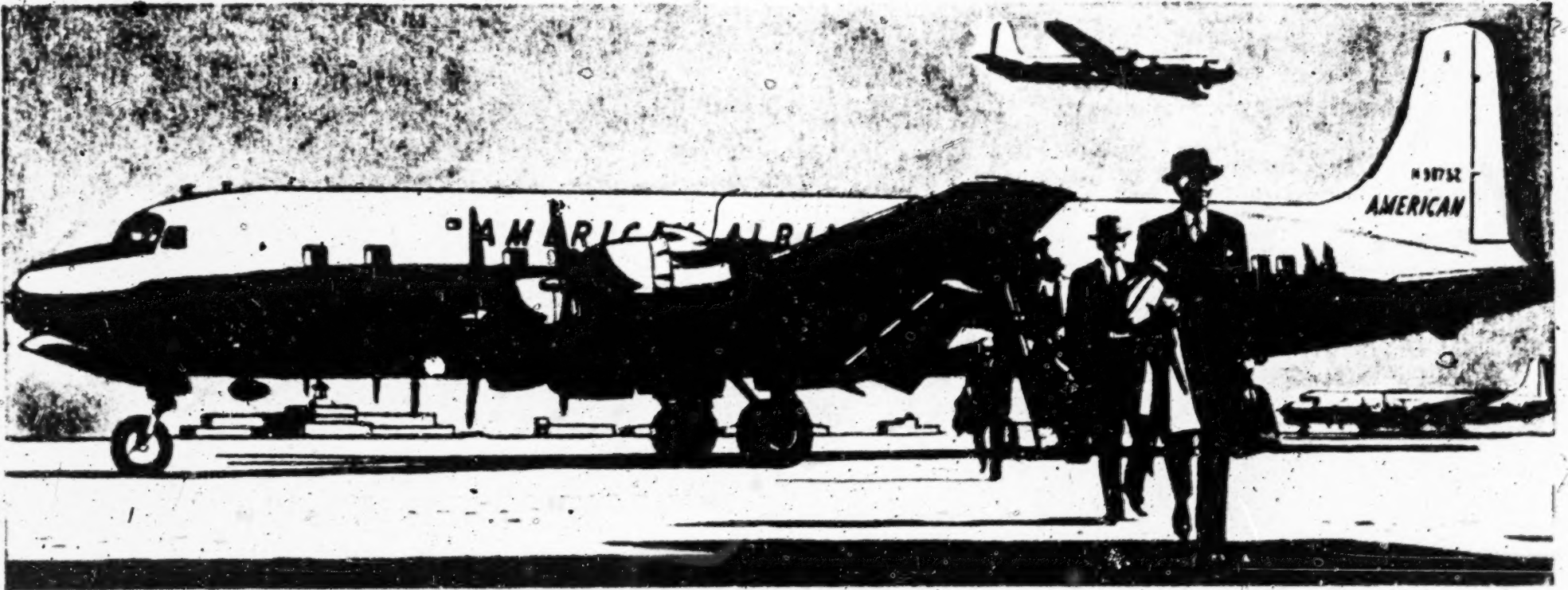
For details see your nearest American Airlines ticket office or write to American Airlines, Inc.

CONVENTION SALES MGR.
100 Park Ave., New York City, N.Y.

AMERICA'S LEADING AIRLINE—

AMERICAN AIRLINES INC.

SAMPLE MAGAZINE ADVERTISING



ARRIVE

BY

AMERICAN

Nowadays with highways jammed and city streets clogged with traffic, it makes more sense than ever to use the Plane-Auto plan instead of driving your own car on business or vacation trips of 100 miles or more.

Why tire yourself needlessly when American whisks you over the long miles in the pleasant comfort of a Flagship seat and makes certain that you'll arrive rested and refreshed.



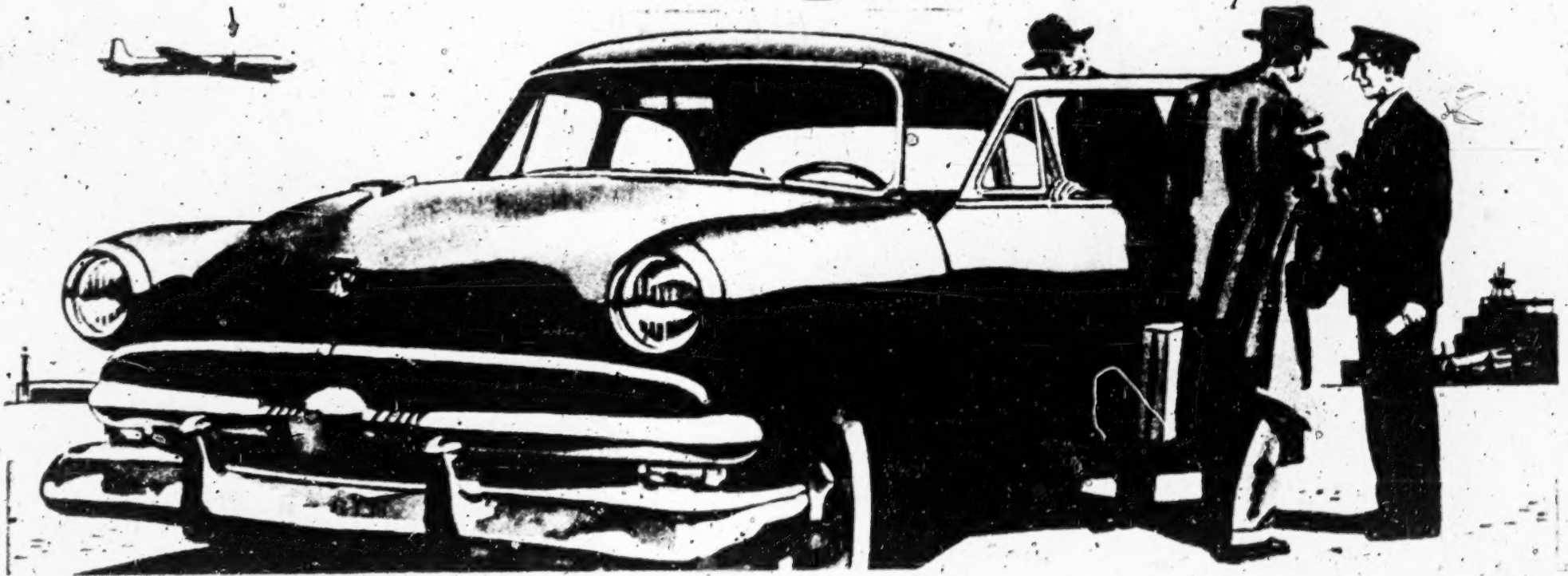
DRIVE

BY

AVIS

Immediately after your Flagship lands, you're on your way to your appointment behind the wheel of an Avis Rent-A-Car. All Avis cars are new models and rates include gas, oil, insurance and maintenance.

This modern travel combination is available in 44 of American Airlines' cities and over 200 throughout the world. You can order your Avis Rent-A-Car when you make your Flagship reservation. So arrive by American—drive by Avis!



AMERICAN AIRLINES INC. AND
America's Leading Airline

AVIS RENT-A-CAR SYSTEM
A LIMITED NUMBER OF AVIS RENT-A-CAR FRANCHISES STILL AVAILABLE
Write: 10734 Fulbright Ave., Detroit 4, Mich.

Reprint of black and white advertisement appearing in Time, January 19, 1953

SAMPLE MAGAZINE ADVERTISING

IN 1950 **AMERICAN** *sets the pace-with the* **FLAGSHIP FLEET!**



AXA *The largest and most modern fleet of transport aircraft in the world today!*

IN 1950—THE FLEET OF THE YEAR IS THE FLAGSHIP FLEET! For American Airlines, and only American, can offer such a vast fleet of aircraft, such a completely modern fleet in every respect. And such a versatile fleet as well—for both the DC-6

and the Convair are designed for the type of route they serve. So, whether you're traveling coast to coast, or to a nearby city, make sure you go by American Airlines Flagship and enjoy air travel at its best on every trip.

THE DC-6 FLAGSHIP

The acknowledged leader in transcontinental travel—first choice of passengers from coast to coast.

THE CONVAIR FLAGSHIP

Especially designed for inter-city travel—especially popular for its comfort and speed.

AMERICAN AIRLINES INC.

AMERICA'S LEADING AIRLINE

Ad 46578—4 color Center Spread
Saturday Evening Post—January 11, 1950
Life—January 16, 1950 (1 Facing Pages—bleed in gutter)
Collier's (Photo)—February 18, 1950

Let AMERICAN bring you — have HERTZ meet you



Use the PLANE-AUTO PLAN
on Business and Vacation Trips!

**AVOID THE STRAIN OF LONG DRIVES
OVER JAMMED HIGHWAYS**

Next time you plan to take a trip there's no need to tire yourself out with tedious driving over clogged highways and through traffic filled cities. There's an easy way to have a car at your disposal — the Plane Auto Plan.

When you use the Plane Auto Plan, you cover the long miles in the restful comfort of a Flagship. And you have a new Hertz Drive-It-Yourself Car at your personal service when you arrive. So, if you want to cover ground, the way to do it is by leaving your car at home and using the Plane Auto Plan.

This sensible travel combination is as easy to arrange as it is convenient to use. You order your car from Hertz at the same time and place you make your Flagship reservation. There's no delay at the airport. Your car will be waiting for you.

Here's the perfect answer to business and vacation travel problems. American Airlines and the Hertz System stand ready to serve you together in 62 Flagship cities. And, of course, there's no finer air travel than Flagship travel — no more dependable rental cars than Hertz Drive-It-Yourself.

AMERICAN AIRLINES INC.



AND



HERTZ Drive-It-Yourself SYSTEM

CIVIL AERONAUTICS BOARD	
5774	AA-1
Doc No. 5728	Exhibit No. 2
Date	3/23/53
Applicant's	Intervenor's Reporter

Reprint of color spread advertisement appearing in Saturday Evening Post, November 15, 1952

128

540

540

MICROCARD

TRADE MARK



5320



55

SAMPLE MAGAZINE ADVERTISING

Let AMERICAN bring you - have HERTZ meet you



Use the PLANE-AUTO PLAN
on Business and Vacation Trips!

AVOID THE STRAIN OF LONG DRIVES
OVER JAMMED HIGHWAYS

Next time you plan to take a trip there's no need to tire yourself out with tedious driving over clogged highways and through traffic-filled cities. There's an easy way to have a car at your disposal - the Plane Auto Plan.

When you use the Plane Auto Plan, you cover the long miles in the restful comfort of a Flagship. And you have a new Hertz Drive-It-Self car at your personal service when you arrive. So, if you want to cover ground, the way to do it is by leaving your car at home and using the Plane Auto Plan.

This sensible travel combination is as easy to arrange as it is convenient to use. You order your car from Hertz at the same time and place you make your Flagship reservation. There's no delay at the airport. Your car will be waiting for you.

Here's the perfect answer to business and vacation travel problems. American Airlines and the Hertz System stand ready to serve you together in 62 Flagship cities. And, of course, there's no finer air travel than Flagship travel - no more dependable rental cars than Hertz Drive-It-Self.

AMERICAN AIRLINES INC.
AND
HERTZ Drive-It-Self SYSTEM

SAMPLE DISPLAY ADVERTISING



SAMPLE DISPLAY ADVERTISING



SAMPLE BROCHURE ADVERTISING

Better by Air ...
Best by American!

With the fleet new Convair—newest Flagship aloft,
American Airlines brings to Air-Age travelers the
finest standards yet in the always-fine standard
American service. Thanks to astonishing efficiency
of operation, the Five-Mile-A-Minute speed and
the postwar comfort of the Convair Flagship are
yours at regular low American Airlines rates.



AMERICAN AIRLINES

Printed in U.S.A.

**WHENEVER YOU'RE
HEADING WEST ...**

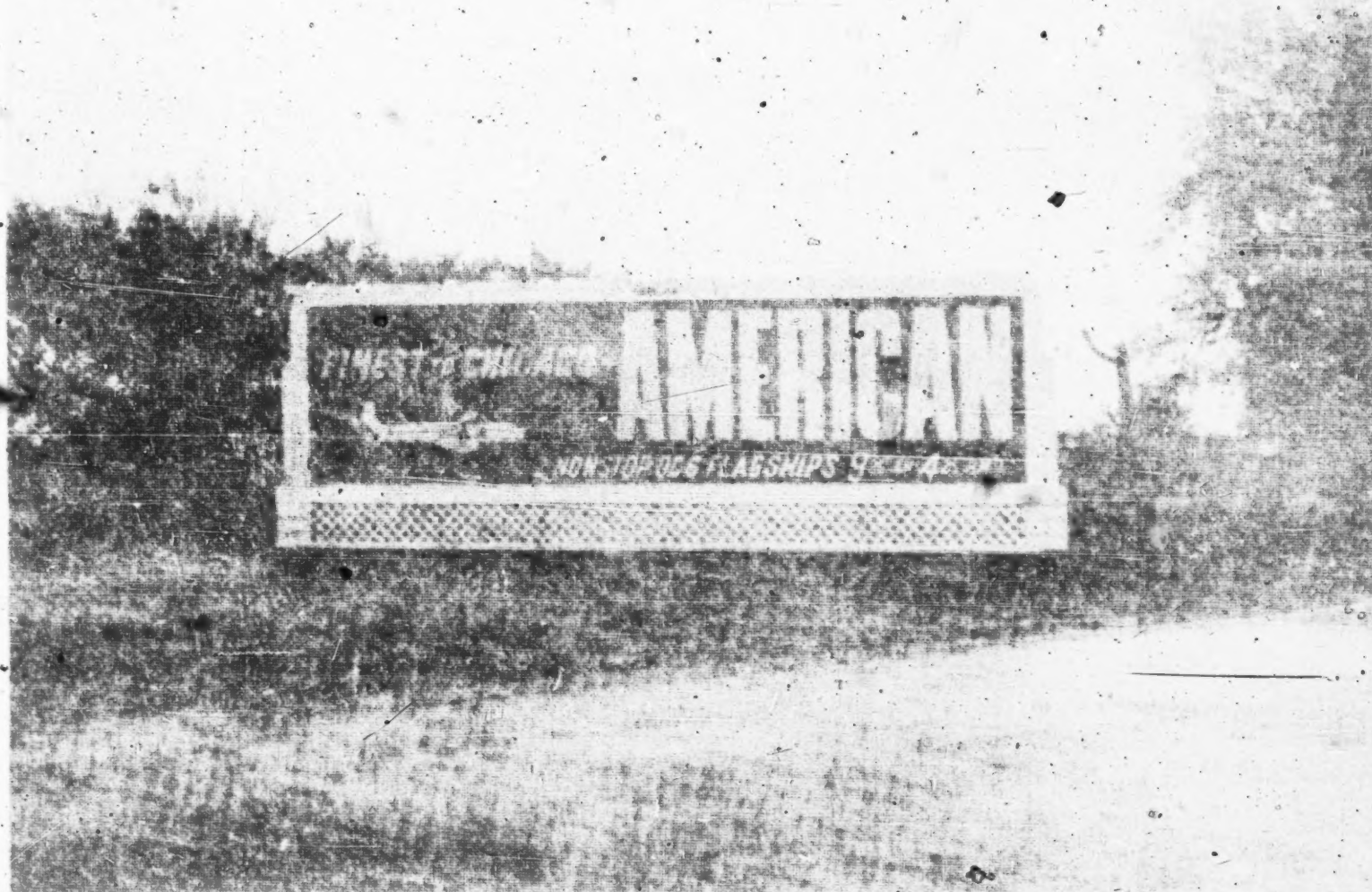
**GO
AMERICAN**

**14 ROUTINGS
FROM WASHINGTON**

OUTDOOR BILLBOARD ADVERTISING



Displayed In Los Angeles Since May 23, 1950



Displayed In Dallas Since December 30, 1950

"THE AMERICAN WAY" ADVERTISING

WHY AMERICAN HAS PRODUCED THE SOUND MOTION PICTURE

Thousands of people will see the sound moving picture "THE AMERICAN WAY." For these countless questions and misunderstandings will be answered. Men and women who have flown a little, if at all, will be shown how efficient and dependably a modern air line operates, why this form of travel has become established acceptance.

It is only logical that American Airlines should sponsor this effort to acquaint more people with the advantages of flying. American Airlines has built a standard of service based on an outstanding performance record. This air line carries more passengers than any other, more than 50 per cent of all U. S. air travelers, and flies over one hundred and twenty million passenger-miles yearly. While American pioneered in the air transportation business, and has now grown to be the country's largest line, we are still pioneering in the advancement of air travel — and will continue to do so to the end that more and more people may know the joy of flying.

MAKE BOOKING RESERVATIONS FOR

"THE AMERICAN WAY"

Early

In offering "The American Way" for showing, we only request that — due to demand — reservations be made early. Upon request, we will gladly furnish complete information on possible showing dates, and will cooperate in arranging every detail connected with its presentation.

FOR AIR TRAVEL INFORMATION AND
RESERVATIONS, CONSULT YOUR
TRAVEL AGENT OR AMERICAN AIRLINES, INC.

MODERN AIR TRANSPORTATION

in Action



EXCERPTS FROM THE
SOUND MOTION PICTURE

"THE
AMERICAN
WAY"



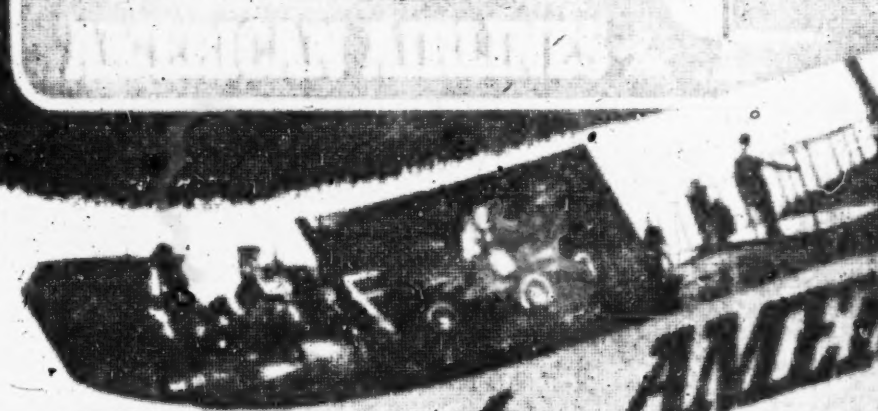
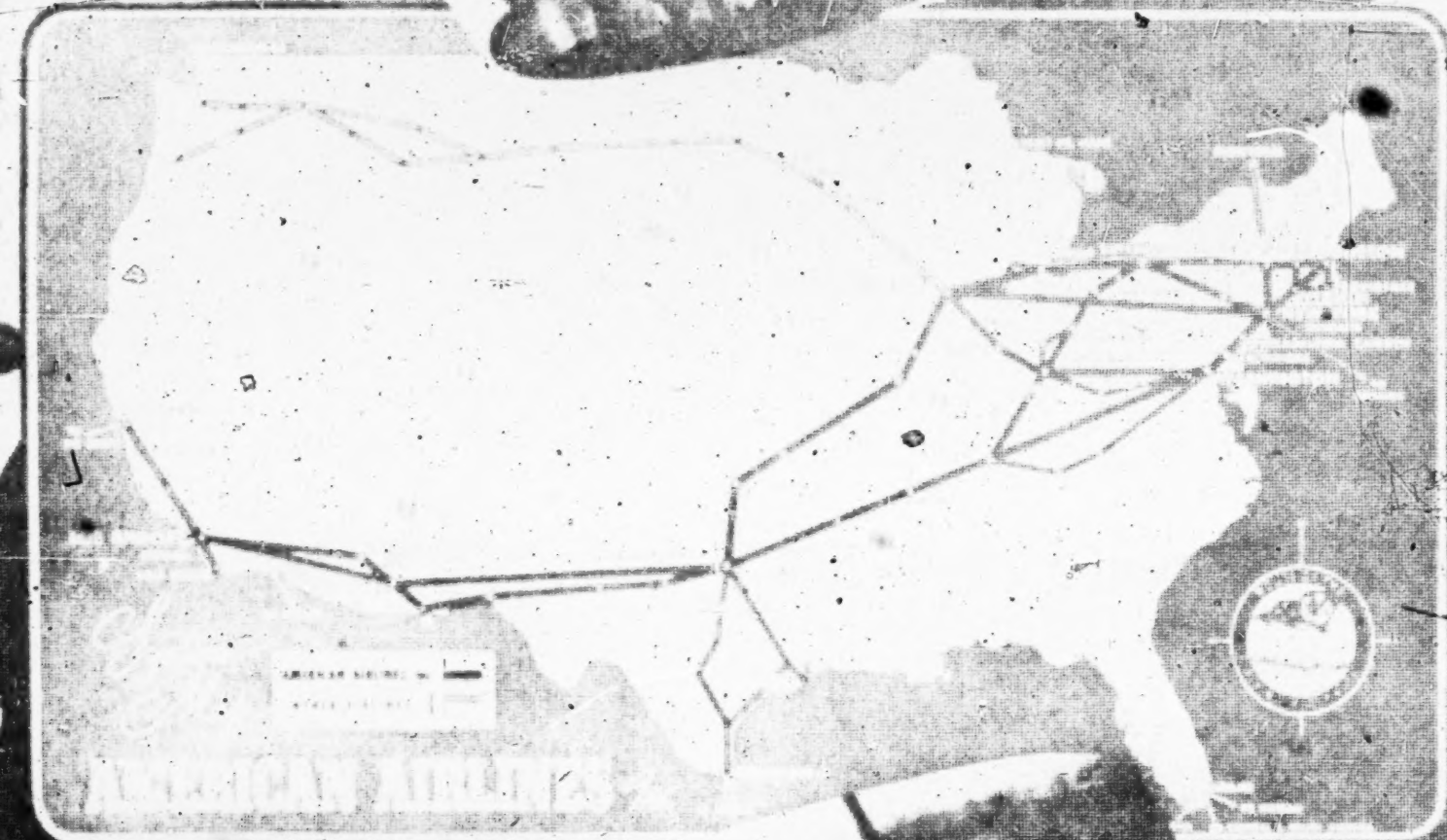
LIFE ALOFT

AMERICAN AT WORK

VACATION FUN

AMERICAN AIRLINES, INC.

Those who Fly in Flagships —



Follow the

AMERICAN WAY

The history of transportation in America is one of the most fast-moving progress. Beginning with Indian canoes on foot and by canoe, the creaking wagon wheel cutting a heavy path through the forest, it is a far step indeed to the great swift airplanes that today speed the traveler from coast-to-coast overnight!

Such progress, such improvement, follows the American way of doing things.

The succeeding pages highlight the methods and spirit of the American way of doing things. The greatest air line as seen in this sound picture. It will show a few of the pleasure and advantages of modern flying as only "The American Way" can show.

131

546

EXHIBIT NO. AA-1
PAGE 14 OF 16 PAGES

546

"THE AMERICAN WAY" ADVERTISING

Scenes from the Sound Picture *The American Way*

**SERVICE AND COMFORT
ON THE AMERICAN STANDARD**



No "sailing" so happy or exciting as this! First meeting, too, with your Flagship Stewardess whose friendly service makes your trip so completely perfect.

Rule No. 1 in air travel — enjoy yourself, and be yourself. Smoke, read, write letters, fill your eyes with a new world below. Flying is a new kind of living — yet your living habits remain the same.

Something to remember — and pictures through your Flagship window are easy to take. Today's airliners are luxuriously designed — quiet, softly carpeted, beautiful and comfortable in every respect.

Stewardesses are graduate nurses — know the intricacies of diapers, bottle warming, child amusement. Travel is fun for parents — with such willing help! Children under 2 fly free, under 12 half fare.

Meals aloft are more than delicious — they're complimentary. On Skydeppers, service is on tables — and you may have morning orange juice or breakfast in bed! Air travel niceties are many.

"And so to bed" in a Flagship Skydipper means a full-length berth, cool sheets and snug blankets, individual air-conditioning. Separate dressing rooms and lavatories make for ease and comfort.

**SPEED AND CONVENIENCE
THAT PAY DIVIDENDS**



He who flies can leave later, arrive sooner. This means more time for sports and recreation, for social and family life, more time for important business, too. Executives fly to cover more territory, to save time on the road, to save salary-hours, to keep ahead of competition. Flying is not only the easiest travel method, but gives definite and exclusive advantages and economies.

Ground service is courteous and efficient. Travel agents, hotel transportation desks, Western Union and Postal Telegraph, and American Airlines' Offices make air travel information and reservations easy to get.

From the heart of Metropolitan centers, comfortable airport cars carry you to airport terminals. Attendants help with every detail, handle luggage, are ready to volunteer any information or service you may need.

American Airlines carries 40 pounds of luggage (more than people to cover average needs) free on your ticket. If you do have luggage in excess of this, American gladly takes care of all details in shipping it ahead.

Ground conditions are no definite indication of flying conditions. Flagships frequently fly "over-weather," above clouds, in bright clear sunshine. Whatever the season, American flies where the weather is good.

**ALL-YEAR VACATION PLEASURE
WITH "TRAVELER'S CHOICE" COAST-TO-COAST!**



American is the only air line flying the Southern All-Year Route coast-to-coast — through the warm sunny Sun Country of Texas, Arizona and Southern California. Vacationers and business travelers find new relaxation, exciting outdoor sports, in the unspoiled American desert. Bright, gay, interesting! The unspoiled American resorts — a land made for enjoyment — all these things are just overnight from the East by Flagship.

In the extra days you save in going by air you can get more play, more rest, more vacation. Traveling by Flagship, you can make "round robin" vacation tours — see and visit the Great Lakes, between Chicago and New York for instance, then make a return trip via Washington at low round-trip fare and a little cost. For extra interest ask about possible optional routings when you fly American.

Air spectacle is Niagara Falls, seen on the regular Niagara Route between New York, Buffalo, Detroit and Chicago. New England, New York State, and the Atlantic Seaboard are other vacation areas in "Flagshipland."

There's an unmistakable joy in going places by air. It offers something for everyone, and all ages. Feeling no sensation of height, or speed, most people enthusiastically declare, "I learned to like flying by flying."

The Route of the Flagships

The American Standard of Service

C. A. B.
DOCKET NO 57.74, 5928

EXHIBIT NO. AA 1
PAGE 16 OF 16 PAGES

AIRCRAFT IDENTIFICATION ADVERTISING



THE NAME "AMERICAN" IN NEWSPAPER ARTICLES

American Buys Planes

The board of directors of American Airlines, Inc., today announced the purchase of 24 DC-6B passenger planes and 6 DC-6A cargo planes. The new equipment represents an investment of \$35,000,000.

Arven H. Saunders, Florida sales manager for American, said the contract with Douglas Aircraft Co., is in addition to the 17 DC-6B's which are being delivered to American this year. The planes announced today are for delivery in 1953.

Miami Daily News
September 20, 1951

**American
Orders 30
New Planes**

NEW YORK—(AP)—American Airlines Inc. announced the purchase for 1953 delivery of 30 planes from the Douglas Aircraft Co. at a cost of \$35,000,000.

They include 24 DC-6B planes capable of carrying 52 passengers and 8,000 pounds of cargo each and six DC-6A airfreighters that carry 27,000 pounds of cargo each.

Douglas, in addition, is delivering to American this year 17 DC-6Bs costing more than \$19,000,000.

C. R. SMITH, airline president, said that when the new planes are delivered, American will have increased its number of available seats by 37 per cent and will have doubled its cargo capacity.

He said the company regards these modern, pressurized, high speed planes as the best equipment before the advent of jet power in air transport service.

"When jet power has been thoroughly tested for commercial use and becomes available, American will purchase jet airplanes," Smith said.

"American Airlines has no plans for the conversion of any of its present aircraft by the installation of jet engines."

Chicago Daily News
September 20, 1951

**AMERICAN WILL
NOT USE JETS****Airlines Orders New Planes of
Propeller Type**

The purchase of 24 DC-6B passenger planes and 6 DC-6A cargo planes at an equipment investment of \$35,000,000 for 1953 delivery was announced today by the Board of Directors of American Airlines, Inc. The contract with the Douglas Aircraft Co. is in addition to the 17 DC-6B's which are being delivered to American this year at an investment in excess of \$19,000,000. Three of the cargo planes had previously been authorized by the directors.

The company announced that no new financing is planned for the purchase of these planes.

When both orders of DC-6B's and the DC-6A's are delivered, American will have increased its number of seats available by 37 per cent and doubled its cargo capacity. The DC-6B's carry 52 passengers and 8,000 pounds more than the DC-6's. The DC-6A airfreighters carry 27,000 pounds of cargo.

These 30 planes have a greater lift than the total number of aircraft contributed by the industry to the military service in 1942. They exceed the capacity of the 60 planes from civilian industry in contract operations on the present Korean air lift. These and American's other 141 airplanes would be available to the government in a national emergency.

As the only major airline operating a completely post-war developed passenger fleet and the largest operator of modern equipment, American Airlines now has flying and on order 28 DC-6 type aircraft and 29 Convairs. In addition, it operates 13 DC-4 airfreighters. The replacement of American's pre-war and war passenger equipment was completed more than two years ago when the DC-3's and DC-4's were retired from passenger service.

American Airlines regards the purchase of these modern, pressurized, high-speed aircraft as the best equipment before the advent of jet power in air transport service.

"When jet power has been thoroughly tested for commercial use and becomes available, American will purchase jet airplanes," C. R. Smith, president, said. "American Airlines has no plans for the conversion of any of its present aircraft by the installation of jet engines. Experience indicates that when a new source of power is developed the best result is obtained by designing new airplanes equipped to utilize that power most effectively."

The Springfield Daily News
September 20, 1951

THE NAME "AMERICAN" IN NEWSPAPER ARTICLES

**American Boasts
All New Airliners**

American Airlines today emerged as the first air transport company with a completely new passenger fleet of postwar-built aircraft a fleet of 125 planes that cost about \$60,000,000 when ordered three years ago, and now worth if replaced \$85,000,000.

The airline yesterday said farewell to its last 21 passenger DC-3s. At one time it had 94 of these, but they have been sold here and abroad for less strenuous passenger use, though still with a lot of service left.

Most of the DC-4s have been sold, or transformed into air freighters.

The present fleet consists of 50 DC-6, long-range, 52-passenger pressurized flagships, for long hauls at 300 miles an hour. And 75 two-engine 40-passenger Convairs, also pressurized, doing 300 m.p.h. for short hauls.

All 125 planes have been paid for, and the last was delivered this week, the company reported.

New York Journal
March 15, 1949

**American Retires Last DC-3;
Air Fleet Fully Modernized**

NEW YORK, March 31 — American Airlines Inc. today retired the last of its famous DC-3s from service and became the world's first airline to have a completely new fleet of postwar passenger transport planes in service.

American delivered a check to the Consolidated Vultee Aircraft Corporation for its last new Convair flagship. The airline now has a completed fleet of 50 new 300-mile-an-hour DC-6s for long-range flights and 75 40-passenger Convairs. They cost the airline about \$60,000,000.

These airplanes were bought and paid for within three years, said President C. R. Smith. The 125 bought in today's market, the airplanes would cost \$85,000,000.

A Victim of Progress

The public has already signified its acceptance of the Convair by the fact that a much larger percentage of seats were sold than on its predecessor, the DC-3, during the period when both were available.

William Littlewood, American's vice president in charge of engineering, helped design and develop the 300-mile-an-hour Convair. He also drew up the specifications for the transport that became the DC-3. Work Horse of the Air. At one time American had 94 DC-3s that

carried 10,500,000 passengers and flew 4,600,000,000 passenger-miles since the first one was delivered in 1936.

The DC-3 is a victim of progress, Mr. Littlewood said today. So many advantages in speed, comfort and safety have been designed into the new DC-6 and Convair flagships that the DC-3 is outmoded.

Thousands Used During War

First manufactured by the Douglas Aircraft Company at American's request and under American specifications, the DC-3 became the standard transport on most U. S. airlines and on many foreign routes. Many were taken over by the Air Force during the war and thousands more designated the C-47. They were built for military use.

American has been retiring its DC-3s piecemeal during the past year as twin-engine Convairs were delivered. One of those retired today is the flagship Newark, the seventh DC-3 ever built.

The Newark once was a highly successful plane, flying between New York and Los Angeles. During the war, she hauled cargo between bases in the U. S. and flew special missions to the Arctic. The 12-year-old plane has been back in passenger service since 1944. Today it was wheeled into a line of surplus DC-3s for sale at American's overhaul base in Tulsa.

Buffalo News
March 31, 1949

ALL POSTWAR PLANES**American to Retire
Last DC-3 Thursday**

American Airlines Thursday will retire the last of its 21-passenger DC-3 planes in favor of larger and faster planes of which the company now has 125 in service.

The air line thus becomes the first to complete its postwar re-equipment program.

At one time American had ninety-four DC-3s, C. R. Smith, president of the company, said Wednesday in announcing the retirement of the last of the slow, small ships.

"We carried 10,500,000 passengers a total of 4,600,000,000 passenger miles between June, 1936, and March, 1949," Smith said.

The company has seventy-five 2-engine, 300-mile-an-hour pressurized Convairs which cost \$22,000,000. Its other fifty planes are the

ties in the arctic, the tropics, over water everywhere in the world, Smith pointed out.

American Airlines has been replacing the outmoded DC-3s piece-meal during the past year as it has received the twin-engine Convair flagships. The Convairs carry forty passengers. Their greater power gives them an added margin of safety.

The Convairs for short-hauls and the mighty 52-passenger DC-6s for long-hauls give American Airlines the industry's change-over com-

The Dallas Morning News
March 31, 1949

**American Readies
4-Engine Fleet**

Twin-engine passenger planes will make their last flights today on the American Airlines system serving 70 cities, C. R. Smith, president of the airline, said here yesterday.

Beginning Friday, the passenger service will use only the four-engine craft — the Douglas-built DC-6 and the Consolidated Vultee Convair — to make the company the country's first 300-mile-an-hour airline.

Smith said the conversion, costing \$40,000,000 since 1945, would make American the first line in the United States to put on "100 per cent new planes since the war."

American's business, he said, was 60 per cent over the first three months of 1948, and he expressed confidence in the business outlook for the immediate future. He described American's proposed sale of its overseas branch to Pan American Airways as a "strictly business deal" so the company could concentrate on domestic air transport.

Ohio State Journal
March 31, 1949

**75th Convair Ship
Sent to American**

The last Convair-Liner plane of an order of 75 has been delivered to American Airlines here, H. D. Koontz, Consolidated Vultee Aircraft Corp. director of sales, announced today.

It will be flown to Tulsa, Okla., for assignment to passenger service. At the same time American said it was retiring all DC-3 planes from service. The airline's fleet of postwar transports will include 50 four-engine DC-6s and the 75 twin-engine Convair-Liners.

San Diego Journal
April 1, 1949

THE NAME "AMERICAN" IN NEWSPAPER ARTICLES

13-Year Career With Air Line Ended by DC-3s

Transports Retired by
American Saw Rugged
War Service as C-47s

Retirement by American Air-
lines of its last DC-3 on Thursday
put a period to one of the final
chapters in the career of "war air"
plane, the C-47 of the war-time
Army Air Forces.

William Littlewood, the air
line's vice-president in charge of
operations, said:

New York Herald Tribune
April 3, 1949

American's Last DC-3 to End Service in Flight Here Today

The last DC-3 in the American
Airlines fleet will be retired from
service at 9 p. m. Thursday at
Municipal Airport, making Ameri-
can the first air transport com-
pany in the world to have a com-
pletely new, postwar fleet.

A DC-3 flight from El Paso will
terminate here and then continue
to Tulsa in one of the company's
new 40-passenger Convair Flag-
ships.

The DC-3s flagship pennant will
be lowered and the plane's doors

sealed by M. D. Miller, regional
vice president in charge of sales,
and Hugh Gallamore, manager of
operations at Fort Worth. Pilots
and stewardesses will form a color
guard.

A scroll will be signed with the
names and addresses of all pas-
sengers and crew during the final
DC-3 flight and copies will be sent
to them.

At one time American had more
than 90 of these planes in a fleet
that carried 10,500,000 passengers

Fort Worth Star Telegram
March 31, 1949

Last of Faithful DC-3's Is Retired by American

American Airlines this week became the first major air pas-
senger carrier in the nation with a complete new post-war fleet.
The changeover came when the last of the DC-3, 21-passenger
planes was retired from nation-
wide routes.

Speedier Convairliners and large
DC-6s now make up the entire
American fleet. H. C. Duncan, Tulsa
sales manager, joined other officials
of the company in observing the
final shift that gave the airlines
a 300-mile-per-hour fleet.
Officials point out that "so many
advantages in speed, comfort and
safety have been designed into the
new aircraft that it outmoded the
DC-3."

Tulsa Daily World
April 2, 1949

All postwar fleet for American Air

American Airlines is today the
owner of the industry's first post-
war air transport fleet.

It's composed of 75 two-engine,
40-passenger, 300 mph pressurized
Convairs for short hauls, and 50
DC-6 long-range, 52-passenger, 300
mph pressurized flagships for long
hauls.

This combined fleet of 125 air-
planes cost the company approxi-
mately \$60,000,000. They were
bought three years ago with the
last one delivered and paid for
last week. Purchased today, the
fleet would cost in the neighbor-
hood of \$85,000,000.

Last of American's 21-passenger
DC-3s, the planes for which Engi-
neering Vice President William
Littlewood drew up specifications,
has been withdrawn from service.
At one time, American had 94
DC-3s in operation. They carried
10,500,000 passengers, 4,600,000
miles between June, 1936, and
March, 1949.

Most of them have now been
sold to companies, private owners
and foreign countries, and most of
the line's old DC-3s have been sold
or transformed into air freighters.

Meanwhile, the company re-
ported a net loss of \$2,893,671 for
1948 as against a deficit of \$3,-
400,766 in 1947. Principal loss oc-
curred in the first quarter of last
year with operations for each of
the last three quarters at a profit.

Daily News
(Los Angeles)
March 31, 1949

American Line Retires Last DC-3

FOR THE first time since 1936,
American Airlines went into oper-
ation throughout the country to-
day without flying a DC-3 model
passenger craft. Yesterday the
company retired its last DC-3s
from service.

Officials said the move made
the aircraft company the first air
transport company in the world
to have a completely new post-
war fleet of passenger aircraft.

A A now has a complete fleet
of 50 DC-6, long-range, 300-mile-
an-hour pressurized flagships and
75 twin-engine, pressurized Con-
vair aircraft, company officials
announced. The DC-6s cost the air-
line about \$38,000,000 and the Con-
vairs about \$22,000,000, it was
stated.

AT ONE TIME American had
more than 90 DC-3s in a fleet that
carried 10,500,000 passengers and
traveled 4,600,000,000 passenger
miles. The DC-3, built by Douglas
Aircraft, was the same as the
Army's C-47 cargo craft which
earned the title of "Workhorse of
the Air."

One of the planes retired yes-
terday was the flagship Newark,
whose history carried her through
commercial passenger service, war
service, freight transport and back
again to passenger service.

The Newark went into service
as a deluxe sleeper plane on the
New York-Los Angeles flight in
1936, carrying 14 sleeping passen-
gers westbound on a 17-hour
schedule, making three stops en
route.

SIX YEARS after her maiden
flight, the Newark joined the
Army. The Army gave her an
abandonment certificate, tore out her
interior fittings and
replaced them with
her military
equipment.
The Newark
went back to AA
con-

Syracuse Herald Journal
April 1, 1949

THE NAME "AMERICAN" IN NEWSPAPER ARTICLES

AMERICAN RETIRES THE DC-3

American Airlines has retired from service its ~~last~~ transport airplanes with the exception of three milk-runners which are slated to go April 1. While the "Doug" has years of scheduled flying ahead of it, the shift to Convair airliners by one of the nation's largest carriers cannot fail to mark an era for the aircraft which has been the workhorse of the airlines since 1933.

What an airplane! Its advent immediately set the pattern for scheduled service the world over. It was standard equipment when the first good air safety records were made in this country. Its logs bear the testimony of countless pilots operating in the gamut of rugged conditions. When war came, its reputation was burnished even more brightly. It filled the tremendous gap in need for a reservoir of transports in a hurry. Out came the plush chairs, in, went the bucket seats, with paratroopers to match. It began to tow gliders. It retrieved them too. Instead of cruising at rigidly prescribed altitudes on the airways, its nose skimmed yards above the desert or the tree tops, or sought concealment by harrelling between the banks of winding rivers. In the war it went everywhere, saw everybody, did everything. Normandy skies held clouds of Dougs, stripped for invasion. It tumbled sup-

New York Times
March 7, 1949

American Gets Last Of 75 Convair Ships

American Airlines has taken delivery on the last of its order for 75 Convair flagships. The 40-passenger transports replace the company's fleet of DC-3 aircraft, the last of which is being retired today. Deliveries on the Convair order began last May. In addition American operates 50 DC-6 airplanes, making it the first airline to have a completely new postwar fleet of passenger aircraft.

Chicago Journal of Commerce
March 31, 1949

American Stops Operating DC-3s

American Airlines will stop using DC-3 airplanes tomorrow to speed up operations, according to President C. R. Smith.

Smith said the airline would use DC-6s and Convairs on passenger runs, while some of the slower DC-4s would be used for some freight operations.

American Airlines will be the first domestic carrier to be operated entirely in excess of 300 miles an hour, Smith said.

He said American Airline business probably would be good this year.

"We are already ahead of the first three months of last year," he said.

The Tribune-Sun
(San Diego)
March 31, 1949

American Starts 300 mpr. Airline

American Airlines starting Friday will be the first "300-mile-an-hour airline" in the nation. C. R. Smith, airline president, announced this Wednesday in Columbus during a trip to confer with local office personnel. He said his company has spent \$60,000,000 since 1945 in a conversion program which also makes it the first line in the country to put on "100 per cent new planes since the war."



C. R. Smith
Douglas-built, four-engine DC-6 and the Consolidated Vultee Convair.

He described American's proposed sale of its overseas branch to Pan American Airways as a "strictly business deal" so that the company could concentrate on domestic air transport. He said his firm's business is 30 per cent over the corresponding period last year.

Columbus Dispatch
March 31, 1949

Airline Stops Using DC-3 Planes

Columbus, O., March 31 (UP)—American Airlines stopped using DC-3 airplanes today to speed up operations, President C. R. Smith said tonight.

Smith said the airline would use DC-6s and Convairs on passenger runs, while some of the slower DC-4s would be used for some freight operations.

American Airlines will be the first domestic service to be operated entirely in excess of 300 miles an hour, Smith said while inspecting local facilities.

The changeover had cost \$60,000,000, he said, while other improvements costing \$20,000,000 had been made since 1945.

Smith predicted the use of jet planes for commercial purposes within six to eight years, but said jet planes now were "too skinny" and impractical for passenger and freight hauling.

He said American Airlines business probably would be good this year.

"We are already ahead of the first three months of last year," he said.

Illinois State Register
March 31, 1949

554 C. A. B.
O Docket Nos. 5774, 5928

Exhibit No. AA 2
Page 6 of 12 Pages

Copy

AETNA LIFE INSURANCE COMPANY
Hartford 15, Connecticut
February 26, 1953

R. E. S. Deichler,
Vice President—Sales

American Airlines
100 Park Avenue
New York 17, N. Y.

Dear Mr. Deichler:

Thank you for your February letter enclosing the booklet of listed hotels as well as *American's* Progress Report for 1952.

I have found my air travel card to be very helpful upon several occasions in cashing checks, not only in hotels which are listed in your booklet but in some others as well.

I recently received the credentials, together with membership card, etc., into the 100,000 Miles Club of United Air Lines. You may be interested in learning that a good part of the approximate 125,000 miles I have flown as a passenger on airlines has been with *American*. As a matter of fact, my first flight of any significance was from El Paso to Nashville aboard an *American* sleeper plane in May of 1939.

It is my understanding that you have an honorary organization in *American* known as the Admiral's Club. I would appreciate any information you could give me regarding the qualifications for membership in such an organization.

Sincerely yours, (S.) William H. Holmes, Pension
Trust Supervisor.

emb.

555

C. A. B.

Docket Nos. 5774, 5928

Exhibit No. AA 2

Page 7 of 12 Pages

Copy

Protectowire
(Trade Mark)

The Protectowire Co.
Hanover, Massachusetts

W. G. Holmes

June 3, 1952

Mr. C. B. Smith, President
American Airlines, Inc.
La Guardia Field,
New York, N. Y.

Dear Fleet Admiral Smith:

Thank you very much for your letter of May 15th. You may be sure I appreciate the duties as well as the privilege of being an Admiral of the Flagship Fleet.

For more than a decade I have been enthusiastic booster for air travel, particularly *the American way*.

There is not the slightest doubt that your personnel is superior to that of other airlines in their contacts with passengers, and particularly prospective passengers. Those who travel more than casually are bound to notice it.

In the general interest, I think your advertisement in Time for May 26th was outstanding.

Sincerely, (S.) W. G. Holmes, President.

WGH/R

566

C. A. B.

Docket Nos. 5774, 5928

Exhibit No. AA 4

Page 2 of 34 Pages

Copy

Robert Mack Light
Attorney at Law
440 Court Street
San Bernardino, Calif.
Telephone 4791

November 30, 1951

American Airlines
523 West Sixth Street
Los Angeles, California

Gentlemen:

I am familiar with your advertising of a "\$70.00 fare" to Chicago and when the other day it became necessary to secure a ticket for a service man's wife to join him under conditions when every penny counted I turned to your service with request for your most economical fare fully expecting the \$70.00 rate, although I did have experience enough with such representations to assume that in your \$70.00 offer you were gracefully sliding over the tax angle of the transaction.

When the ticket was delivered for flight 602 for 9:50 A. M. tomorrow morning, I was, to put it frankly, shocked to find the base charge \$85.00 instead of \$70.00, with, of course tax on top of that. And then shortly after, frankly to my rather considerable irritation, I heard the KMPC 3:30 P. M. program break spot announcement of your \$70.00 fare to Chicago.

Have you any reason to suggest why this matter should not be called to the attention of the Federal Communications Commission?

Very truly yours, (S.) Robert M. Light

RML:P

556

C. A. B.

Docket Nos. 5774, 5928

Exhibit No. AA 2

Page 8 of 12 Pages

Copy

DEPARTMENT OF COMMERCE
National Production Authority
Washington 25

November 27, 1951

Mr. R. E. S. Deichler
Vice President—Sales
American Airlines
100 East 42nd Street
New York 17, New York

Dear Mr. Deichler:

The receipt of your "Winter Travel Report" today reminded me of the always courteous service which is rendered by *American*.

I would like to take this opportunity to expound a bit about the Washington Admirals Club. It is my pleasure to report that at no time when called upon to aid with reservations or to extend the use of the club facilities have I ever received anything but the most courteous reception.

Thanking *American* and your Washington Club personnel for such enjoyable hours of travel that I experience, I remain

Sincerely yours, (S.) J. E. Sweeney

557

C. A. B.

Docket Nos. 5774, 5928

Exhibit No. AA 2

Page 9 of 12 Pages

*Copy*Dear Mr. C. R. Smith: I am flying with *American*.*From* Los Angeles. *To* Chicago.

On Flight Number 606 and I feel that of all the airlines I have travelled, *American* is far better than the others. The service I received has been excellent and I really have

567 C. A. B.
Docket Nos. 5774, 5928

Exhibit No. AA4
Page 3 of 34 Pages

Copy

December 4, 1951

Mr. Robert Mack Light
440 Court Street,
San Bernardino, California

Dear Mr. Light:

This will acknowledge your letter of November 30. It would appear as though the advertisement you heard over the radio was that of a non-scheduled airline. One such company uses a name very similar to ours. American Airlines is a certificated scheduled airline.

American Airlines does not advertise on Station KMPC and has never offered a rate of \$70.00 from Los Angeles to Chicago. Our aircoach fare is \$85.00 plus a Federal Transportation Tax of 15%, as published in our tariff which is filed with the Civil Aeronautics Board.

We regret that because of an apparent misunderstanding you received the impression our company was engaged in a false advertising practice, as our policy has always been entirely the opposite of that.

Despite the fact the ticket you purchased from us cost in excess of the transportation you heard advertised on the radio, we are sure the difference in price was more than compensated for in service. American's aircoach flights are operated with 300 mile-per-hour Douglas DC-6 pressurized airplanes, which operate non-stop Los Angeles to Chicago in 6 hours and 25 minutes providing the finest aircoach transportation obtainable.

Yours very truly, Frank M. Burg, District Sales
Manager.

FMB:hem

enjoyed my trip. Now I know why so many people fly *American*. I cannot suggest any improvement, as I feel it is beyond improving. I want you to know when I fly again you can be sure it will be *American*.

My Name; Chris G. Velickoff.

Street and No. 20239 Norwood.

Business Address, City and Zone No.; Detroit 34, Mich.

Date 10/28/52.

AA Form T15J.

558

C. A. B.

Docket Nos. 5774, 5928

Exhibit No. AA 2

Page 10 of 12 Pages

Copy

M. C. Rumbaugh, M. D.

P. J. Morgan, M. D.

H. C. Smith, M. D.

H. B. Harris, M. D.

Office Hours

By Appointment

RUMBAUGH CLINIC

10 West Dorrance Street

Kingston, Penna.

Jan. 7, 1952

R. E. S. Deichler, Vice President

American Airlines

100 Park Avenue

New York 17, N. Y.

My dear Mr. Deichler,

Your letter of January 2nd regarding the termination of the Dallas to Washington flight at Knoxville, Tennessee in December, I feel that no apology is necessary and I appreciate the safety precaution offered. I want to commend very highly Mr. Hallock, your sales manager in Knoxville, as he handled the situation in a way that kept all the passengers happy. I assure you I always fly *American* when I can.

Very sincerely yours, M. C. Rumbaugh, M. D.

MCR:jp.

559 C. A. B.
Docket Nos. 5774, 5928

Exhibit No. AA 2
Page 11 of 12 Pages

Copy

The Coca-Cola Co.
P. O. Drawer 1734
Atlanta 1, Georgia
John D. Goodloe
Vice President
November 12, 1951

Miss V. Ponder
Secretary to Mr. E. L. Roy
American Airlines
Love Field
Dallas 9, Texas

Dear Miss Ponder:

With reference to your kind note of November 2, this is to advise that the size 7 moccasins were received and were exactly the right size.

I appreciate so much your kindness in the matter and I shall continue to fly *American* as often as possible just as I have been doing for a number of years.

Very truly yours, John D. Goodloe:

560 C. A. B.
Docket Nos. 5774, 5928

Exhibit No. AA 2
Page 12 of 12 Pages

Copy

Dear Mr. C. R. Smith: I am flying with *American*.
From New York City. *To* Cincinnati.
On Flight Number 164 and 335.

Having fine trip as usual. I have especially enjoyed the on schedule service with few delays that *American* has been able to give. Even tho once flight 560 left Chicago at 7:16 and I arrived at 7:17 and missed it I couldn't help but realize that this is certainly a step in the right direction.

The very simple and efficient way *American* handles

568 C. A. B.
Docket Nos. 5774, 5928

Exhibit No. AA4
Page 4 of 34 Pages

Copy

Robert Mack Light
440 Court Street
San Bernardino, California

December 5, 1951

Radio Station K M P C
5939 Sunset Boulevard
Hollywood, California

Gentlemen:

I recently caused the purchase of an ~~airline~~ ticket from Los Angeles to Chicago on the basis of advertisements heard over your station which I am prepared to swear were made in the name of American Airlines indicating a fare of \$70.00. This ticket came to hand and was paid for on the 28th day of November 1951 and to my amazement I found that the basic charge was \$85.00 instead of the \$70.00 I had anticipated from your advertisement and for that reason the matter was very fresh in my mind when on November 29th at 3:30 p. m. on your station break announcement, I again heard in a name which I am prepared to swear was American Airlines, an Announcement offering a \$70.00 fare to Chicago. When this matter was called to the attention of American Airlines by letter addressed to that company on the 30th day of November, 1951, reply from that company was forwarded to me by Frank M. Burg, District Sales Manager, advising that that company had never advertised rates of \$70.00 from Los Angeles to Chicago and moreover that that company does not advertise on your station.

I will appreciate an explanation of this matter. I am sending a copy of this letter to the attention of Mr. Burg.

Very truly yours, (S.) Robert M. Light.

RML:C

cc: American Airlines
523 West Sixth Street
Los Angeles 14, Calif.
att: Mr. Frank M. Burg
District Sales Manager

569 C. A. B.
Docket No. 5774, 5928

Exhibit No. AA4
Page 5 of 34 Pages

Copy

Robert Mack Light
440 Court Street
San Bernardino, California

December 12, 1951

Radio Station K M P C
5939 Sunset Boulevard
Los Angeles 28, California

Attention: Mr. R. O. Reynolds, Vice President

Gentlemen:

I acknowledge with thanks letter addressed to me by Mr. Reynolds under date of December 11th enclosing the script of the air line advertisement placed on the air at 3:30 p. m. on November 29th, 1951 and in which you request that I let you know if there is any further question about the matter.

I have no further question about the matter, but I do feel that it is only right and proper to point out that while naturally I am in no position to question the inclusion of the word "North" in the script. I am very much in a position to state what impression the actual *spoken* word made upon at least one listener and that was in effect to so far emphasize the words "American Airlines" and de-emphasize the word "North" as it appears in the script as to create the impression that the entire subject of discussion was "American Airlines".

Very truly yours, (S.) Robert M. Light.

RML:C

570 C. A. B.
Docket Nos. 5774, 5928

Exhibit No. AA4
Page 6 of 34 Pages

Copy

Affidavit

STATE OF CALIFORNIA,
County of Los Angeles, ss:

I Frederic W. Nicholls, being first duly sworn, state the following:

baggage and checking in at the airports is very commendable.

I wrote once before and would like some specific info on the different Flagships.

Congratulations on an exceptionally well managed airline.

My Name: F. Allen Vieweger.

Street and No.: 8001 Hamilton Ave.

Business Address: Crosley Mfg. Co.

City and Zone No.: Cincinnati, Ohio.

Date 1-20-51.

AA Form T15J.

* * * * *

During the month of April, 1952, Mr. F. M. Burg, District Sales Manager for American Airlines, received a call from Mr. James C. Meeks who is affiliated with the Painters Union Local 116 at 1748 Santee Street, Los Angeles, California. Mr. James C. Meeks notified Mr. F. M. Burg that American Airlines ticket-office signs were being repainted by non-union painters, and that some action would be taken unless this practice was discontinued.

I was contacted by Mr. F. M. Burg to investigate and to call Mr. Meeks at Richmond 77861. I personally called Mr. James C. Meeks and explained that to our knowledge no American Airlines signs were being repainted at the time and further explained that all sign painting was handled under contract by local firms which we knew to be union. I asked Mr. Meeks to please take no action until he had time to investigate further, and to let me know what additional information he could obtain.

Mr. James C. Meeks called me later in the day and advised that the American Airlines office involved was located on Hill Street. I advised Mr. Meeks that American Airlines did not maintain a Hill Street location, and after considerable conversation explained to his satisfaction that the sign involved was a North American Airlines sign which pertained to a non-scheduled airline, being in no way affiliated with American Airlines.

10/28/52 (S.) Frederic W. Nicholls

Subscribed and sworn to before me this 28th day of October, 1952.

(S.) J. E. Higgins, Notary Public. (Seal.)

573

C. A. B.

Docket Nos. 5774, 5928

Exhibit No. AA 4

Page 9 of 34 Pages

Copy

Affidavit

STATE OF CALIFORNIA,

County of Los Angeles, ss:

I, Emily Jeanne Newkirk, being first duly sworn, state

PO-131



No. 514294

THE UNITED STATES OF AMERICA

To All To Whom These Presents Shall Come:

This is to certify that by the records of the United States Patent Office it appears that American Airlines, Inc.,
of New York, N. Y., a corporation of Delaware,

did, on the 27th day of July, 1948, duly file in said Office an application for Registration of a certain SERVICE MARK shown in the Drawing for the SERVICES specified in the Statement, a copy of which Drawing and Statement, together with the Declaration, is hereby annexed and made a part hereof, and duly complied with the requirements of the law in such case made and provided, and with the regulations prescribed by the Commissioner of Patents.

And, upon due examination, it appearing that the said applicant is entitled to have said Mark registered under the Trade-Mark Act of 1946, the said Mark has been duly registered this day in the United States Patent Office on the

This is to certify that by the records of the United States Patent Office it appears that American Airlines, Inc.,
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And, upon due examination, it appearing that the said applicant is entitled to have said Mark registered under the Trade-Mark Act of 1946, the said Mark has been duly registered this day in the United States Patent Office on the

PRINCIPAL REGISTER

to American Airlines, Inc., its successors or assigns.

This certificate shall remain in force for Twenty Years unless sooner terminated as provided by law.

In Testimony Whereof I have hereunto set my hand and caused the seal of the Patent Office to be affixed, at the City of Washington, this twenty-third day of August, in the year of our Lord one thousand nine hundred and forty-nine, and of the independence of the United States the one hundred and seventy-fourth.

Lawrence B. Kingsland
COMMISSIONER OF PATENTS

TEST:

John L. Himmel
LAW EXAMINER

Registered Aug. 23, 1949

Registration No. 514,294

PRINCIPAL REGISTER

Service Mark

Section 2 (f)

UNITED STATES PATENT OFFICE

American Airlines, Inc., New York, N. Y.

Act of 1946

Application July 27, 1948, Serial No. 562,340

AMERICAN AIRLINES

(Statement)

American Airlines, Inc., a corporation duly organized under the laws of the State of Delaware, having its principal place of business at 100 East 42nd Street, New York, New York, has adopted and is using the service mark shown in the accompanying drawing, for AIR TRANSPORT OF PASSENGERS AND FREIGHT, in Class 35, Services, and presents herewith five photographs showing the said mark as used in connection with the sale or advertising of such services, the said mark being used as follows: on aircraft and other mobile equipment, on letterheads, advertising pamphlets, leaflets, tickets and timetables, and

(Declaration)

R. E. S. Deichler, being duly sworn, deposes and says that he is a vice president of American Airlines, Inc., the applicant named in the foregoing statement, that he believes that said corporation is the owner of the service mark herein sought to be registered which is in use in commerce among the several States and between foreign nations and the United States; that the said mark has become distinctive of the services of applicant and its related companies described below, having been in exclusive and continuous use by applicant and said related companies in said commerce for more than five years next preceding the date of the filing of this application; that no other person, firm

Application July 27, 1948, Serial No. 562,340

AMERICAN AIRLINES

(Statement)

American Airlines, Inc., a corporation duly organized under the laws of the State of Delaware, having its principal place of business at 100 East 42nd Street, New York, New York, has adopted and is using the service mark shown in the accompanying drawing, for AIR TRANSPORT OF PASSENGERS AND FREIGHT, in Class 35, Services, and presents herewith five photographs showing the said mark as used in connection with the sale or advertising of such services, the said mark being used as follows: on aircraft and other mobile equipment, on letterheads, advertising pamphlets, leaflets, tickets and timetables, and generally in applicant's advertising, promotional and performance activities pertaining to such services; and requests that the same be registered in the United States Patent Office on the Principal Register in accordance with section 2(f) of the act of July 5, 1946. Applicant makes no claim in the registration to the word "Airlines" apart from the mark shown, reserving, however, all other rights in or to the same.

The word "American" was first used in the sale or advertising of services and the services rendered in commerce among the several States which may lawfully be regulated by Congress in March 1930 by American Airways, Inc., a Delaware Corporation, applicant's predecessor. The service mark in the form shown in the drawing was first used in April 1934 and first used in the sale or advertising of services and the services rendered in commerce among the several States which may lawfully be regulated by Congress in April 1934.

AMERICAN AIRLINES, INC.,
By WM. J. HOGAN,
Treasurer.

(Declaration)

R. E. S. Deichler, being duly sworn, deposes and says that he is a vice president of American Airlines, Inc., the applicant named in the foregoing statement, that he believes that said corporation is the owner of the service mark herein sought to be registered which is in use in commerce among the several States and between foreign nations and the United States; that the said mark has become distinctive of the services of applicant and its related companies described below, having been in exclusive and continuous use by applicant and said related companies in said commerce for more than five years next preceding the date of the filing of this application; that no other person, firm, corporation or association, to the best of his knowledge and belief, has used or has the right to use said mark in commerce which may lawfully be regulated by Congress either in the identical form thereof; or in such near resemblance thereto as might be calculated to deceive, save and except use thereof in commerce between foreign nations and the United States by American Overseas Airlines, Inc., a corporation of Delaware, and American Airlines de Mexico, S. A., a corporation of Mexico, each of which is controlled by applicant in respect to the nature and quality of the services in connection with which said mark is used; that the drawing and description truly represent the mark sought to be registered; that the photographs show the said mark as actually used in connection with the sale or advertising of services; and that the facts set forth in the statement are true.

AMERICAN AIRLINES, INC.,
By R. E. S. DEICHLER,
Vice President.

§ 1033 This Registration will be canceled by the Commissioner of Patents at the end of six years following the date of registration, unless within one year next preceding the expiration of such six years, the registrant file in the Patent Office an affidavit showing that said mark is still in use or showing that its nonuse is due to special circumstances which excuse such nonuse and is not due to any intention to abandon the mark.

For the past two and one-half years, I have managed American Airlines ticket office at Lockheed Air Terminal, Burbank, California. I continually talked to passengers who have contacted American Airlines to check in for North American Airlines' 9:30 departure. I explain to these passengers that they are talking to American Airlines and that North American is a non-scheduled airline who has a flight departure at 9:30 P. M.

I also have passengers contact me who present a Buyers League Script Book and who state that the coupons are good for discount on American Airlines. One passenger in particular (name unknown) stated positively that his script book entitled him to a discount and was not satisfied until after calling his secretary who informed that the name was North American Airlines.

People who come to Burbank to meet passengers coming in on North American flights continually contact my office for information after seeing the American Airlines sign. When notified that North American is a non-scheduled airline they ask what is the difference between a scheduled or a non-scheduled airline.

Passengers arriving Burbank on N. A. tried to get baggage at A. A. L. counter, Tr. 107, 8 a daily occurrence.

10/28/52 (S.) Emily Jeanne Newkirk.

Subscribed and sworn before me this 28th day of October, 1952.

(S.) J. E. Higgins, Notary Public. (Seal.)

574 C. A. B.
Docket Nos. 5774, 5928

Exhibit AA4
Page 10 of 34 Pages

Copy
Affidavit

STATE OF CALIFORNIA,
County of Los Angeles, ss:

I, Bonnie Rowley, being first duly sworn, state the following:

I am reservations agent with American Airlines telephone sales department.

On October 22 at two o'clock in the afternoon a Mrs.

Rutt called and inquired as to the arrival of flight 628 from Miami. She had just received a telegram stating that relations were arriving American Airlines at Burbank.

Since Mrs. Rutt had stated that she had traveled on American Airlines many times and knew our arrivals and departures were from International Airport, she was very skeptical and called inquiring if we had changed the location of our airport.

I explained the facts of "American Airlines" being confused with the non-scheduled "North American Airlines" at which statement the inquirer expressed shock and dismay at her relatives' misguidance.

10/28/52 (S.) Bonnie Rowley.

Subscribed and Sworn to me this 28th day of October 1952.

(S.) J. E. Higgins, Notary Public. (Seal.)

582

C.A.B.

Docket Nos. 5774, 5928

Exhibit No. AA 4

Page 18 of 34 Pages

COPY

AFFIDAVIT

STATE OF CALIFORNIA,

County of Los Angeles, ss.

I, Corinne O. Perry, being first duly sworn, state the following:

I have been assigned as ticket agent for the past thirteen months at American Airlines ticket office located at Lockheed Air Terminal, Burbank, California.

During the time I have been stationed at Burbank, passengers frequently contact me asking what time our flight will arrive in Burbank. I explain to these passengers that American Airlines does not operate into Burbank, and finally have to direct them to the North American Airlines ticket counter.

I have also had passengers contact me who present an A.F. of L. Buyers League Script Book and state that the

coupons are good for discount on American Airlines. These people also have to be informed that this script is good on North American Airlines which is not affiliated with American Airlines in any way.

I also continually talk to passengers who come to the American Airlines ticket counter to check in for North American's 9:30 departure. I explain to these people that they are talking to American Airlines and that it is North American Airlines, a non-scheduled airline, who has a flight at 9:30 P.M.

There is definitely a lot of confusion in the minds of the people I have talked to regarding the difference between American Airlines and North American Airlines. Most of these people, when told the difference, insist that they understood that the airline that they purchased their ticket on was a scheduled carrier.

10/29/52 (S.) CORINNE O. PERRY.

Subscribed and sworn to before me this 29th day of October, 1952.

(S.) J. E. HIGGINS,
Notary Public.

592 C.A.B.
Docket Nos. 5774, 5928

Exhibit No. AA 4
Page 28 of 34 Pages

COPY

Report of Inquiry
Re "North American Airlines"

While on duty as a ticket agent for American Airlines, Inc., on November 13th, 1952, an inquirer entered the office at approximately 2:30 P.M. requesting information about "North American Airlines" services.

The caller said

I was told by a friend not to take American Airlines because they take about 3 days instead of the scheduled time to go from New York to Los Angeles.

The passenger was under the impression she was talk-

ing to N. American Airlines and there was definite confusion between the two names.

(Signature) (S.) CORINNE O. PERRY,
(Ticket Agent).

Los Angeles.

594 C.A.B.
Docket Nos. 5774, 5928

Exhibit No. AA 4
Page 30 of 34 Pages

COPY

Report of Inquiry RE "North American Airlines."

While on duty as a reservations agent for American Airlines, Inc., on 15 November, 1952; I received a telephone call at approximately 10:30 A.M. requesting information about "North American Airlines" services. The caller said, "I would like to check on your flites to New York that I saw advertised on television last nite for \$80.00". Upon asking the airline she claimed that it was AAL as she had written the name down. I explained that it was North American she had seen, and the difference, upon which we finally made a res. for her with her 10 yr old child on our Air Tourist Service. (Psgr's name Mrs. Fernandez HLD6 604/8 Dec)

(Signature) (S.) BONNIE ROWLEY,
Reservations Agent.

Los Angeles.

CAB
597 Docket Nos. 5774, 5928

Exhibit No. AA 4
Page 33 of 34 Pages

COPY

Report of Inquiry RE "North American Airlines."

While on duty as a ticket agent for American Airlines, Inc., on November 18th, 1952 an inquirer entered the office

at approximately 5:00 P. M. requesting information about "North American Airlines" services.

The caller said,

"My son was supposed to leave Washington last night and to arrive at 8:30 this morning, but when I checked I was told they were unable to get out on account of fog. Can you tell me whether they will be leaving Washington tonight."

I then stated that to my knowledge our flights had had no difficulty in Washington; the caller said

"I was told by your Santa Monica office that the flight would leave tonight and arrive at Burbank tomorrow morning. I cannot seem to get a co-ordinated story."

The caller insisted that it was American Airlines and became indignant when I told her that we had no Santa Monica office nor did we operate into Burbank.

Caller was referred to N. American.

(S.) Corinne O. Perry, Ticket Agent.

. Los Angeles

* * * * *

601 CAB
Docket Nos. 5774, 5928

Exhibit No. AA 5
Page 3 of 38 Pages

COPY

Affidavit of Margery Avery, New York

I, Margery Avery, being first duly sworn state the following:

While on duty as a reservations agent for American Airlines, Inc., on October 25, 1952, I received three telephone calls from persons requesting information about North American Airlines' services, as follows:

Between 10:00 and 12:00 A. M., I received a call requesting information about American's \$44.00 fare to Miami, Florida. I explained that American did not serve Miami. It developed that the caller had seen North American Airlines advertising a \$44.00 fare to Miami.

At approximately 1:00 P. M. I received a call requesting

information as to the arrival of a North American Airlines' flight from the West Coast.

At approximately 2:00 P. M. I received a call from another person requesting information about the arrival of a North American Airlines' flight from the West Coast.

(S.) Margery H. Avery

Subscribed and sworn to before me this 4 day of November, 1952:

New York

(S.) Miriam J. O'Connor, Notary Public
(SEAL)

606 CAB
Docket Nos. 5774, 5928

Exhibit No. AA 5
Page 8 of 38 Pages

COPY

Report of Inquiry RE "North American Airlines"

While on duty as a reservations agent for American Airlines, Inc., on November 8, 1952, I received a telephone call at approximately 2:15 P. M. requesting information about "North American Airlines" services.

The caller said, and insisted, that he just heard on the radio, American Airlines advertising \$24.00 service to Chicago. I tried to explain, but passenger became irritated and insisted again, that I evidently didn't know my fares. I'm afraid we lost a passenger—he definitely believed I was in the wrong, by stating repeatedly "It was American."

(S.) Carolyn Houck, Reservations Agent.

New York

The caller was certain it had been American, because she had been to the airport when her friend departed.

(S.) Barbara A. Heide, Reservations Agent.

New York.

①

607 CAB
Docket Nos. 5774, 5928

Exhibit No. AA 5
Page 9 of 38 Pages

COPY

Report of Inquiry
RE "North American Airlines."

While on duty as a reservations agent for American Airlines, Inc., on Nov. 8, 1952, I received a telephone call at approximately 3 P. M. requesting information about "North American Airlines" services.

The caller said,

"Is this where I make reservations on North American Airlines?"

(S.) Barbara A. Heide, Reservations Agent

New York

609 CAB
Docket Nos. 5774, 5928

Exhibit AA 5
Page 11 of 38 Pages

COPY

Report of Inquiry
RE "North American Airlines."

While on duty as a reservations agent for American Airlines, Inc., on Nov. 10, 1952, I received a telephone call at approximately 11:55 A. M. requesting information about "North American Airlines" services.

The caller said,

"North American?"

"No sir, this is American Airlines."

"Is this North American Airlines?"

"No, American Airlines. May I help you?"

"Wrong number."

(S.) Barbara A. Heide, Reservations Agent.
New York.

613 CAB
Docket Nos. 5774, 5928

Exhibit No. AA 5
Page 15 of 38 Pages

COPY

Report of Inquiry
RE "North American Airlines."

While on duty as a reservations agent for American Airlines, Inc., on 11/22/52, 1952, I received a telephone call at approximately 4:25 P. M. requesting information about "North American Airlines" services.)

The caller said,

Inquiring re information Non Sked into Marine Base from Chicago.

(Signature) (S.) M. H. AVERY,
Reservations Agent.

New York.

614 CAB
Docket Nos. 5774, 5928

Exhibit No. AA 5
Page 16 of 38 Pages

COPY

Report of Inquiry
RE "North American Airlines."

While on duty as a reservations agent for American Airlines, Inc., on 11/22/52, 1952, I received a telephone call at approximately 5:50 P.M. requesting information about "North American Airlines" services.

The caller said,

North American Airlines to Miami

(Signature) (S.) M. H. AVERY,
Reservations Agent.

New York.

615 CAB

Docket Nos. 5774, 5928

Exhibit No. AA 5

Page 17 of 38 Pages

COPY

Report of Inquiry
RE "North American Airlines."

While on duty as a reservations agent for American Airlines, Inc., on November 22, 1952, I received a telephone call at approximately 8 P.M. requesting information about "North American Airlines" services.

He was interested in securing information regarding N.A. Fli. that was grounded in Kansas City.

(Signature) (S.) JEAN REYNOLDS,
Reservations Agent.

New York.

• • • • •

623 CAB

Docket Nos. 5774, 5928

Exhibit No. AA 5

Page 25 of 38 Pages

COPY

Report of Inquiry
RE "North American Airlines."

While on duty as a reservations agent for American Airlines, Inc., on December 5, 1952, I received a telephone call at approximately 1:15 P.M. requesting information about "North American Airlines" services.

The caller said,

Her friend had a ticket on North American Airlines for a flite this afternoon at 3:00 p. to Miami. The caller wanted to know from where the flite would be leaving. I said that it would probably be from the Marine Terminal, but that

she should call NE 9-9000 for further information.

(Signature) (S.) BARBARA A. HEIDE,
Reservations Agent.

New York

625 CAB
Docket Nos. 5774, 5928

Exhibit No. AA 5
—Page 27 of 38 Pages

COPY

Report of Inquiry
RE "North American Airlines."

While on duty as a reservations agent for American Airlines, Inc., on Wednesday 12/7, 1952, I received a telephone call at approximately 4:40 P. M. requesting information about "North American Airlines" services.

The caller said,

Insisted "American" advertised flights to Miami in newspapers and magazines.

(Signature) (S.) MARGERY H. AVERY,
Reservations Agent.

New York

628 CAB
Docket Nos. 5774, 5928

Exhibit No. AA 5
Page 30 of 38 Pages

COPY

Report of Inquiry
RE "North American Airlines"

While on duty as a reservations agent for American Airlines, Inc., on *December 11*, 1952, I received a telephone call at approximately 5:15 P. M. requesting information about "North American Airlines" services.

The caller said,
he wanted information about our service to Miami. When told that the service is on Eastern and National, he replied that last year he'd flown American to Miami for approx. \$39—He then said he'd been given information about a flite at 9:30 A. M., and wanted to know if North American is the same as American Airlines. The passenger evidently was quite confused. He realized he'd flown on a non-sked airline last year, and he was certain we could help him with the same type of service.

(S.) Barbara A. Heide, Reservations Agent
New York.

633

CAB

Docket Nos. 5774, 5928

Exhibit No. AA 5

Page 35 of 38 Pages

COPY

Report of Inquiry

RE "North American Airlines."

While on duty as a reservations agent for American Airlines, Inc., on December 22, 1952, I received a telephone call at approximately 8:45 A. M. requesting information about "North American Airlines" services.

The caller said,
he was expecting a flight from California which is coming into the Marine Terminal. I asked him which airline is operating the flight, and he answered "American."
I suggested he call NE. 9-9000 for information.

Barbara A. Heide, Reservations Agent •

New York.

634 CAB
Docket Nos. 5774, 5928

Exhibit No. AA-5
Page 36 of 38 Pages

COPY

Report of Inquiry
RE "North American Airlines"

While on duty as a reservations agent for American Airlines, Inc., on *December 23, 1952*, I received a telephone call at approximately *11:10 P. M.* requesting information about "North American Airlines" services.

The caller

stated that we went to Miami. I explained we did not have direct service and suggested Eastern and National. Passenger quite confused, was sure it was American.

(S:) Carolyn Housk, Reservations Agent
New York.

636 CAB
Docket Nos. 5774, 5928

Exhibit No. AA 5
Page 38 of 38 Pages

COPY

Report of Inquiry
RE "North American Airlines"

While on duty as a reservations agent for American Airlines, Inc., on *December 29, 1952*, I received a telephone call at approximately *4:40 P. M.* requesting information about "North American Airlines" services.

The caller said,

she wanted fare information on our Air Tourist service to Chicago. When I told her \$33.00 plus tax, making a total of \$37.95, she said that was strange. A friend had taken American Airlines from Chicago and paid \$24.00 plus tax.

BROCHURES CIRCULATED BY "NORTH AMERICAN"

SAN FRANCISCO CHICAGO KANSAS CITY NEW YORK MIAMI

NORTH AMERICAN AIRLINES

Over 185,000,000 Safe Passenger Miles

Large baggage allowance provided

Carries a blanket up to \$50,000.00

at any NAA office.

stewardesses are at your service. Free snacks are served

Public

and from the airport will be

Orders Accepted.

for the fast, safe, economical way

FLY dependable NAA

NORTH AMERICAN AIRLINES

New York
Chicago
Kansas City
Los Angeles
Oakland
San Francisco
San Diego
Miami

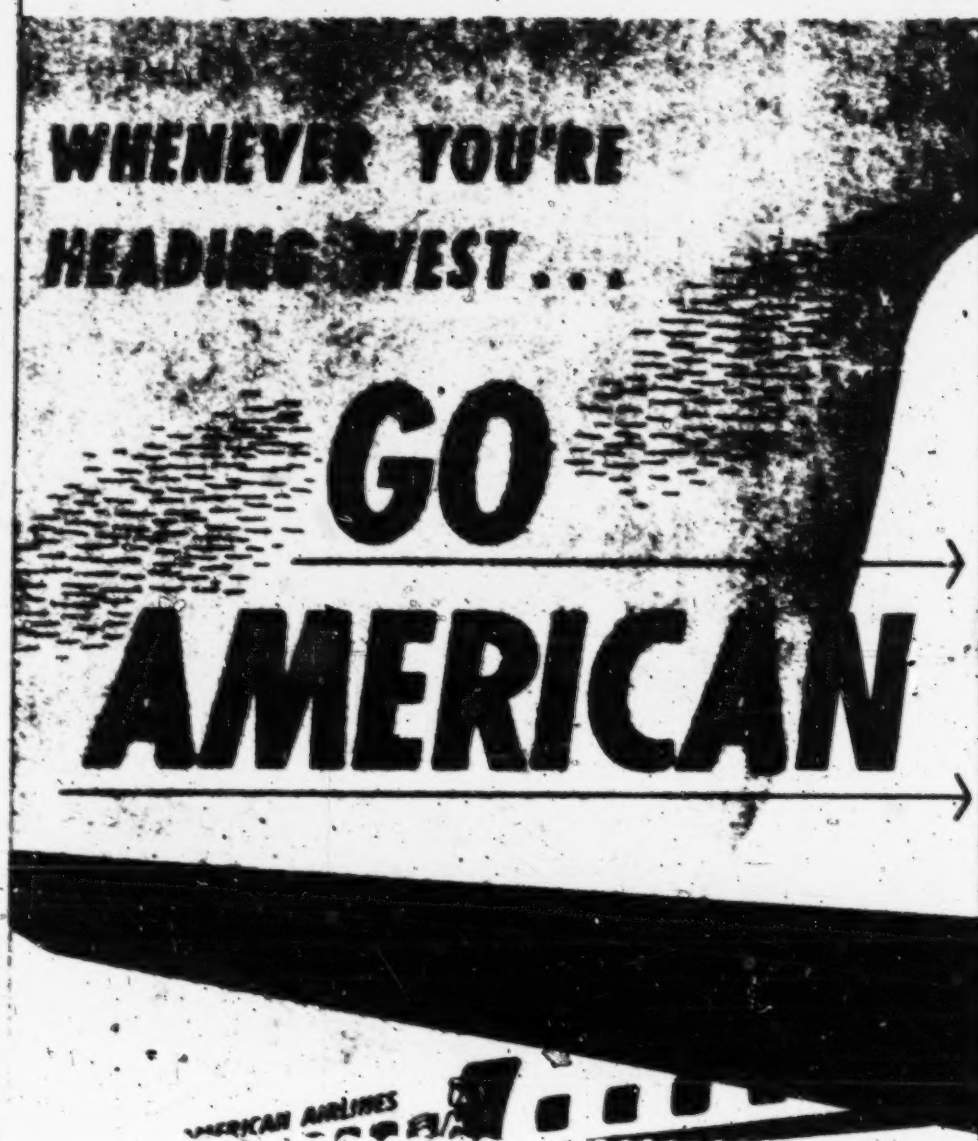
4 ENGINE
DOUGLAS
DC-4
FIVEASTERS

ONE OF THE NATION'S LARGEST
INDEPENDENT AIRLINES

SAMPLE BROCHURE ADVERTISING

Better by Air ...
Best by American!

With the fleet new Convair—newest Flagship aloft,
American Airlines brings to Air-Age travelers the
finest standards yet in the always-fine standard
American service. Thanks to astonishing efficiency
of operation, the Five-Mile-A-Minute speed and
the postwar comfort of the Convair Flagship are
yours at regular low American Airlines rates.



With the fleet new Convair—newest Flagship aloft,
American Airlines brings to Air-Age travelers the
finest standards yet in the always-fine standard
American service. Thanks to astonishing efficiency
of operation, the Five-Mile-A-Minute speed and
the postwar comfort of the Convair Flagship are
yours at regular low American Airlines rates.



AMERICAN AIRLINES

Printed in U.S.A.



Stipulation of Facts

The following items are stipulated as facts for purposes of this proceeding:

1. American Airlines, Inc. was incorporated in Delaware on April 11, 1934, and commenced business on May 13, 1934 when it acquired all of the assets of American Airways Inc., which had been incorporated January 25, 1930. Since commencing business, American Airlines, Inc. has continuously engaged in the air transportation of persons, property and mail. Pursuant to certificates of public convenience and necessity duly issued under the Civil Aeronautics Act, American Airlines, Inc. is, and has since prior to August 22, 1938 engaged in such air transportation on a regularly scheduled basis between, among other places, New York, Chicago and Los Angeles.

2. Twentieth Century Airlines, Inc. was incorporated in North Carolina on May 4, 1946, and holds a letter of registration as a large irregular air carrier. On March 3, 1952, Twentieth Century Airlines, Inc. amended its articles of incorporation so as to change its name to North American Airlines, Inc. Since on or about April 21, 1951, Twentieth Century Airlines, Inc. has engaged in the air transportation of persons between, among other places, New York, Chicago and Los Angeles under the name "North American Airlines" or "North American".

3. American Lines, Inc. has registered the name "American Airlines" under the Federal Trademark Act, 15 U. S. C. 1051 *et seq.* on the Principal Register (No. 514294) as a service mark used in connection with the furnishing of air transportation. An authentic copy of such registration certificate is reproduced as American's Exhibit AA-3 in this proceeding.

* * * * *

"NORTH AMERICAN AIRLINES, INC."

Dockets Nos. 5774 and 5928

Stipulation of Documentary Material

It is hereby stipulated and agreed by and between counsel for the parties and intervenors herein and Bureau Counsel that the following documents and material shall, by this reference, be incorporated into and considered a part of the record in this proceeding:

1. The Official Guide of the Airways for each month prior to April, 1943; the Universal Airline Schedules for each month from April 12, 1943 through September, 1944; the American Aviation Traffic Guide for each month from October, 1944 to and including October, 1948, and the Official Airline Guide for each month prior to and including the date of oral argument before the Board in this proceeding;

* * * * *

5. Monthly reports, Forms 2380 and 2789, for each month through December, 1946, and monthly and quarterly reports, Forms 41 and 41 (a) filed with the Board by American Airlines, Inc. prior to and including the date of oral argument before the Board;

* * * * *

7. Airline Traffic Surveys for September, 1946, March, 1947, September, 1947, March, 1948, September, 1948, March, 1949, and any similar surveys issued or made available to the parties by the Civil Aeronautics Board prior to the date of oral argument before the Board in this proceeding;

664 8. Recurrent Reports of Mileage and Traffic Data, of all Domestic Airline Carriers, 1945-1949, prepared by the Economic Bureau of the Civil Aeronautics Board, and any similar recurrent reports officially released by the Civil Aeronautics Board prior to the date of oral argument before the Board in this proceeding;

* * * * *

11. Letter of March 11, 1952 to the Civil Aeronautics Board advising it of change of name of Twentieth Century Airlines, Inc., to North American Airlines, Inc. and suggesting issue of letter of registration in new name.

* * * * *

FLY
NORTH
AMERICAN
AIRLINES

INSIST ON
4-ENGINE

DEPENDABILITY
WITH THE
LEADING & LARGEST
AIRCOACH SYSTEM

N. York \$80*

Chicago \$70*

HONOLULU \$121.50

* Each Way R.T. Special
Low Fares to Other Cities

CALL COLLECT

TR-0711

Complimentary Meals
Stewardess Service
Free Ticket Delivery

"Fly Now—Pay Later"

ALWAYS CALL

NORTH AMERICAN

L.A.

TR-0711

631 S. OLIVE ST.

Hollywd.

GL-6141

1640 N. VINE ST.

Long Beach

L.B. 708971

San Diego

111 W. OCEAN BLVD.
Main 2006

342 S. BROADWAY

TR-0711

680

175

CAB.
DOCKET NO. 5774, 5928

EXHIBIT NO. AA 11

Return in 3 days to
New York Underwriters Insurance Co.
EMERSON L. DUFF
Resident Agent
1011 E. Bennett Avenue
GLENORA, CALIFORNIA



North American Air Lines,
521 W. 6th. St.,
Los Angeles, Cal.

700

May 4, 1953.

Mr. Clifton J. Stratton, Jr.
c/o Covington & Burling
Union Trust Building
Washington, D. C.

RE: North American Airlines, Inc.,
Dockets Nos. 5774 and 5928

Dear Mr. Stratton:

This will acknowledge receipt of late-filed exhibits Nos. AA-8A and AA-10 through AA-26 in the above-entitled proceeding.

You are advised that Exhibit AA-8A, offered in evidence at the hearing, was not received in evidence but was permitted to accompany the record as an offer of proof. Therefore, in accordance with the Examiner's ruling appearing on page 245 of the official record, the above-named exhibit will accompany the record as offer of proof.

You are further advised that exhibits AA-10 through AA-26 will be received in evidence in the above proceeding.

Very truly yours,

WALTER W. BRYAN,
Examiner.

CC: to all parties
WWBRYAN:MO

704

BEFORE THE CIVIL AERONAUTICS BOARD

Docket No. 5774

In the matter of the application of NORTH AMERICAN AIR-
LINES, INC., for authority to conduct its operations under
the name of North American Airlines, Inc.

Docket No. 5928

In the matter of an investigation pursuant to section 411 of
the Act of certain practices of NORTH AMERICAN AIRLINES,
INC.

BRIEF OF ENFORCEMENT ATTORNEY

to
EXAMINER WALTER W. BRYAN

* * * * *

718. There is no evidence in the record which shows
that North American adopted its name with intent or
design to trade upon the good will and business reputation
of American Airlines, nor is evidence of such intent neces-
sary to sustain a finding that the practice is unfair or decep-
tive or an unfair method of competition.

It is indeed novel, however, that North American should
adopt a trade name which so closely resembles that which
has been used by American for a number of years. North
American could have adopted a name so dissimilar that
any question of similarity could have been avoided, and
there would have been no tendency on the part of the public
to mistake one carrier for the other. There would have
been no opportunity to allege that North American by
selecting its name attempted to trade upon the good will
and business reputation which had been developed through
the years by American or that the public was unnecessarily
inconvenienced by the similarity of the names of the two
carriers.

* * * * *

EXHIBIT AA-12

C. A. B.

Docket Nos. 5774, 5928

Exhibit No. AA-12A is a North American Airlines ticket with a cover similar to that in NAA Exhibit 2, page 1, except as to serial number. Exhibit No. AA-12B is a North American Airlines ticket with a cover similar to that in NAA Exhibit No. 2, page 2, except as to serial number.

799

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
Washington, D. C.

NORTH AMERICAN AIRLINES, INC.

Docket Nos. 5774 and 5928

In the matter of the application of North American Airlines, Inc., for authority to conduct its operations under the name of North American Airlines, Inc., and an investigation pursuant to section 411 of the Act of certain practices of North American Airlines, Inc.

INITIAL DECISION OF WALTER W. BRYAN, EXAMINER

Served: June 19, 1953

Upon:

Hardy K. Maclay, 1317 F Street, N.W., Washington 4, D.C., for North American Airlines, Inc.

Clifton J. Stratton, Jr., 701 Union Trust Bldg., Washington, D. C., for American Airlines, Inc.

Robert M. Johnson, Office of Enforcement, Civil Aeronautics Board, Washington 25, D. C.

John J. Stowell, Bureau of Air Operations, Civil Aeronautics Board, Washington 25, D.C.

This decision shall become final 10 days after the date of service shown above and shall become effective upon the issuance of a Board order pursuant to Rule 28 of the Rules of Practice, unless within such 10-day period exceptions thereto are filed by one or more of the parties with the Docket Section, Civil Aeronautics Board, Washington 25, D. C., and served upon all other parties. If exceptions are filed within the period prescribed, briefs may be filed and served on all other parties within a further period of 10 days.

CAB
DOCKET NO. 5774, 5928

EXHIBIT NO. AA 13

WASHINGTON QUANTICO PENSACOLA CORPUS CHRISTI

S. M. Rice Co.
Successor to "Youde's"
CIVILIAN AND MILITARY TAILORS
1342 G STREET N. W., WASHINGTON 5, D. C.
STERLING 3-6253; 3-6254

American Airlines Inc.,
718 - 14th St. N.W.
Washington, D.C.

FREE PARKING - CAPITAL GARAGE

PLEASE DETACH AND RETURN WITH YOUR CHECK.

BILLING DATE	ITEMS	PURCHASES	MOSE. RETURNED OR CASH PAID	PAY LAST AMOUNT IN THIS COLUMN
	Tailoring Charges for Two coats - M. Porter	10.00		18.00*
	Tailoring charges for two shirts - L. Hathaway	8.00		

BILLING DATE	ITEMS	PURCHASES	MOSE. RETURNED OR CASH PAID	PAY LAST AMOUNT IN THIS COLUMN
	Tailoring Charges for Two coats - M. Porter	10.00		18.00*
	Tailoring charges for two shirts - L. Hathaway	8.00		

S. M. Rice Co.
1342 G STREET N. W.
WASHINGTON 5, D. C.

WASHINGTON, D.C.
JAN 11 1953

Postmark: WASHINGTON, D.C. JAN 11 1953



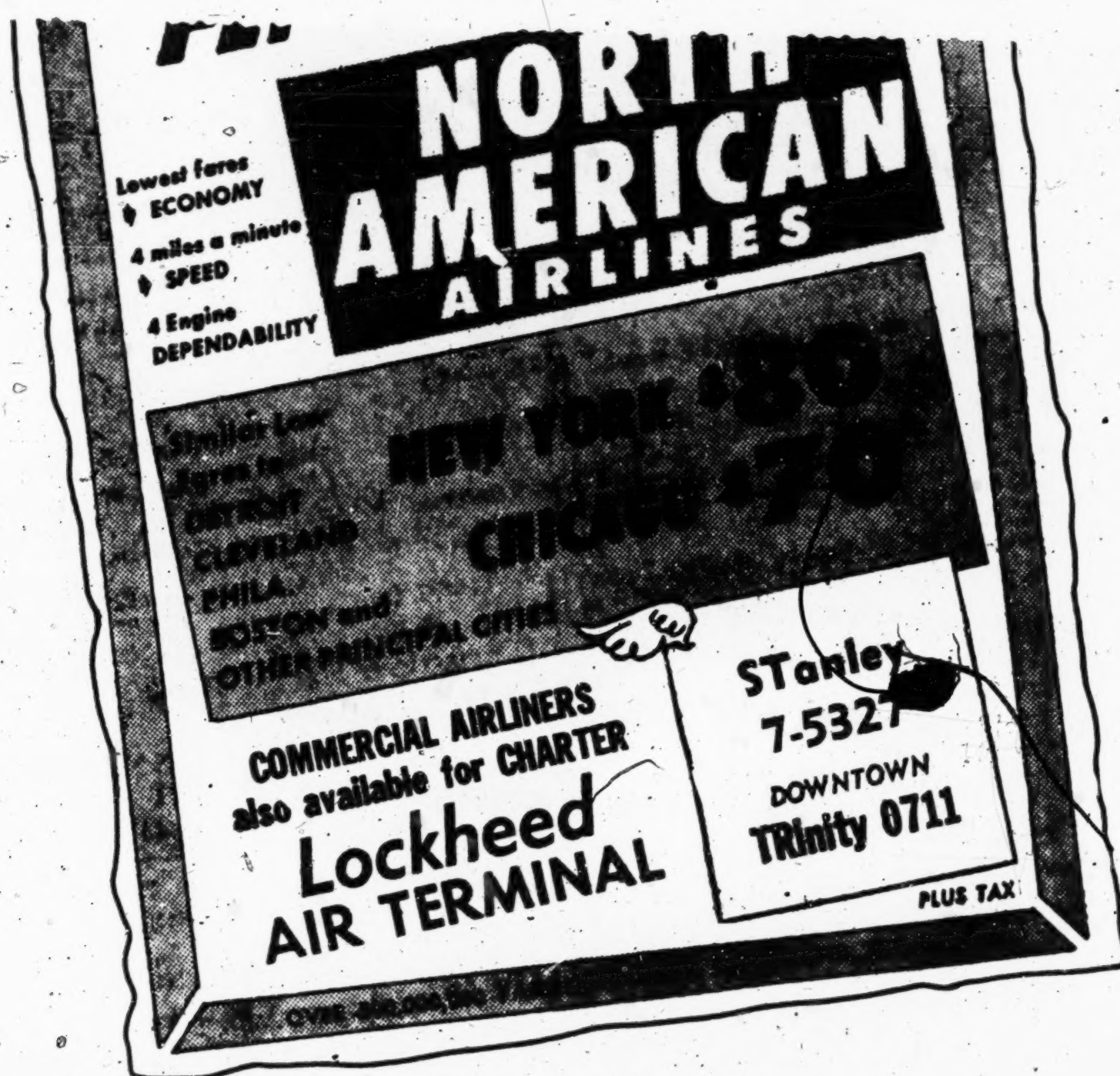
FLY  **4 ENGINE**
DOUGLAS AIRLINERS

NORTH AMERICAN AIRLINES

Lowest fares
↓ **ECONOMY**
4 miles a minute
↓ **SPEED**
4 Engine
DEPENDABILITY

Similar Low
Fares to
DETROIT

NEW YORK



NORTH AMERICAN AIRLINES

Lowest fares
↓ **ECONOMY**
4 miles a minute
↓ **SPEED**
4 Engine
DEPENDABILITY

Similar Low
Fares to
DETROIT
CLEVELAND
PHILA.
BOSTON and
OTHER PRINCIPAL CITIES

NEW YORK \$80
CHICAGO \$70

COMMERCIAL AIRLINERS
also available for CHARTER

**Lockheed
AIR TERMINAL**

Stanley
7-5327
DOWNTOWN
TRinity 0711

PLUS TAX

C.A.B.
DOCKET NO. 5774, 5928

EXHIBIT NO. AA 16

FLY NORTH AMERICAN WAY

FLY

WORTH THE AMERICAN WAY

Insist on 4 ENGINE Dependability

- Alitized Cabins
- Food Served Aloft
- Free Ticket Delivery
- Free Parking
- Nightly Limousine Service to Airport

NEW YORK \$80*

CHICAGO \$70*

*Each Way - on Round Trip Excursion

DAILY FLIGHTS TO:
HONOLULU

EXbrook
3-6791

FLY NORTH AMERICAN WAY

FLY NORTH AMERICAN WAY

Insist on 4 ENGINE Dependability

- Alitized Cabins
- Food Served Aloft
- Free Ticket Delivery
- Free Parking
- Nightly Limousine Service to Airport

NEW YORK \$80*

CHICAGO \$70*

*Each Way - on Round Trip Excursion

DAILY FLIGHTS TO:
SAN FRANCISCO, HONOLULU

Low Fares to Other Principal Cities

Located in
215 WILSHIRE BLVD. • SANTA MONICA

EXbrook
3-6791

ALL FARES PLUS TAX

OVER 500,000,000 PASSENGER MILES OF FAITHFUL SERVICE

FLY NORTH AMERICAN WAY

800

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
Washington, D. C.

NORTH AMERICAN AIRLINES, INC.

Docket Nos. 5774 and 5928

Concluded:

1. That the use of the name North American, or any combination of the word "American" by Twentieth Century Air Lines, Inc., constitutes an unfair or deceptive practice and an unfair method of competition within the meaning of section 411 of the Act.

2. That the public interest requires that the application of Twentieth Century Air Lines, Inc., Docket No. 5774, for authority to engage in air transportation under the name North American Airlines be denied.

3. That an order be issued against Twentieth Century Air Lines, Inc., to cease and desist from using the name "American" in any combination of words to designate its name.

Appearances:

Hardy K. Maclay for North American Airlines, Inc.

Howard C. Westwood, Ernest W. Jennes, and Clifton J. Stettin, Jr., for American Airlines, Inc.

Robert M. Johnson, Enforcement Attorney

INITIAL DECISION OF WALTER W. BRYAN, EXAMINER

This proceeding arises as the result of the Board's order serial No. E-7107, dated January 28, 1953, in which it is ordered that an investigation be instituted to determine whether North American Airlines, Inc., formerly Twentieth Century Air Lines, Inc., in engaging in air transportation under the name of North American Airlines, Inc., North American Airlines, or North American, has been and is engaging in activities and practices in violation of section 411 of the Act; and if any such violation is established whether the Board should issue an order directing North American to cease and desist from such violations.

It is indicated in the record that on March 11, 1952, Twentieth Century Air Lines, Inc. (Twentieth Century) advised the Board that the corporate name of Twentieth Century had been changed to North American Airlines, Inc., (North American) effective March 3, 1952, and it requested the Board to change its records accordingly and reissue its letter of registration in the new name.

On August 19, 1952, the Board adopted an amendment No. 7 to Part 291 of its Economic Regulations, effective September 23, 1952. The above amendment added a new section, 291.28, *Business Name of Air Carrier*, which provided:

“On and after November 15, 1952, it shall be an express condition upon the operating authority granted by this Part and the letters of registration issued hereunder that the air carrier concerned, in holding out to the public and in performing air transportation services shall do so only in a name the use of which is authorized under the provisions of this section.

(a) Except as otherwise provided under paragraph (b) of this section, an air carrier may do business in the name in which its letter of registration is then issued and outstanding, including abbreviations, contractions, initial letters, or other minor variations of such name which are readily identifiable therewith.

(b) An air carrier may do business in such other and different name or names as the Board may by order permit, upon a finding that the use of such other name or names is not contrary to the public interest. Any such permission may be made conditional upon the abandonment of the use of the name in which its letter of registration is issued and outstanding, in air transportation service by the air carrier concerned, or otherwise be made subject to such reasonable terms and conditions as the Board may find necessary to protect the public interest.”

On October 6, 1952, North American timely filed an application under the above regulation for authority to conduct its operations under the name North American Airlines, Inc., in lieu of Twentieth Century Air Lines, Inc. Upon

consideration of this application the Board determined to institute the above described investigation: and by its order consolidated the above application, Docket No. 5774, with the investigation proceeding; Docket No. 5928, for hearing and decision.

American Airlines, Inc., (American) was permitted to intervene and participated in the proceeding. A hearing has been held and all parties given an opportunity to file briefs with the Examiner.

Issues.—The issue involved here is whether North American has been or is engaged in unfair or deceptive practices, or unfair methods of competition in air transportation, within the meaning of section 411 of the Act, by the use of the name North American Airlines, Inc., North American Airlines, or North American, and if any violation is established whether North American should be ordered to cease and desist therefrom; also whether the granting of the request in North American's application for leave to change its name to North American Airlines, Inc., would be contrary to the public interest.

Twentieth Century Airlines, Inc., was incorporated in North Carolina on May 4, 1946, and holds a letter of registration as a large irregular air carrier. On March 3, 1952, the above carrier amended its articles of incorporation so as to change its name to North American Airlines, Inc. Since on or about April 21, 1951, the above carrier has engaged in the air transportation of persons between, among other points, New York, Chicago, and Los Angeles, under the trade name of North American Airlines.

American Airlines, Inc., (American) the intervenor in this proceeding, was incorporated in Delaware on April 11, 1934, succeeding American Airways, Inc., which was incorporated under the laws of Delaware on January 25, 1930. American has continuously engaged in air transportation of persons, property, and mail since the above dates and has operated between, among other places, New York, Chicago, and Los Angeles as a scheduled air carrier.

American registered on July 27, 1948, the name "American Airlines" under the Federal Trademark Act, 15 U.S.C. 1051 et seq., on the Principal Register (No.

514294) of the United States Patent Office as a service mark used in connection with the furnishing of air transportation.

Since 1934 American has concentrated in its advertising the names "American" and "American Airlines" with the purpose of creating in the public mind an identity between the name American and its air transportation service. There were introduced in evidence samples of such advertising as "American Leading Airline," "Better by Air," "Best by American," "American to Detroit the Most Frequent Service," "American to Washington \$98 via DC-6 Airtourist Service," "American to New York 11 Nonstop Flagships," and "American's Convairs Are Coming."

The above type of advertising has appeared weekly on 251 billboards and in 142 newspapers throughout the country with a combined circulation of approximately 28,000,000. American has spent in excess of \$2,250,000 for the above type of advertising since 1949.

American has also advertised extensively in magazines and during the period between 1948 and 1952 it spent approximately \$3,800,000 for such advertising. It also advertises in the various cities served by American by means of display signs appearing at airports and in other public places. In 1940 American produced a sales movie entitled "The American Way," which has been shown to groups throughout the country, depicting its service and the comfort, speed and convenience of air travel. American is currently spending on newspaper and billboard advertising approximately \$600,000 annually.

804 An officer of American in testifying stated that in his opinion the extensive advertising of American service as being the leading airline in American air commerce had been accepted by the traveling public. He further stated that much of American's advertising is devoted to identifying American with a certain route structure and with a certain type of superior equipment.

The direct evidence of record consists of testimony of witnesses who, for the most part, are employed by American as ticket and reservation agents located at Los Angeles, Burbank, Chicago, and New York. There were also affidavits and written statements from ticket and reservation

agents received in evidence for the purpose of establishing whether the names "American" or "American Airlines" and "North American" or "North American Airlines" are confusing to the traveling public.

The above evidence generally involved numerous inquiries on the part of the public made to American employees concerning service, rates, routes, and schedules of North American under the mistaken impression that North American and American were one and the same airline.

An officer of American testified that he had received from employees under his supervision numerous inquiries indicating confusion between American Airlines and North American Airlines, and that his office had received numerous requests for collect telephone calls from people who were attempting to contact North American. It was established that American did not receive collect calls while North American did. The same witness stated that his office had received a telephone call from a representative of a trade union, complaining that an American sign was being painted by non-union painters, and upon investigation it was found that the sign was that of North American. There were instances of air passengers holding North American tickets attempting to check in for North American flights at American ticket counters—in fact, at the Burbank office this was a daily occurrence—and many of the passengers were still confused after an explanation had been made that American and North American were two different airlines. There were instances where North American passengers attempted to claim their baggage at the American counter; also other instances where prospective passengers insisted they were entitled to a discount for transportation on American because they held a "Buyers League Scrip Book." Upon an investigation by the passengers making the inquiries, it was learned that it was North American instead of American which offered a discount.

There were other instances of persons meeting incoming North American passengers who made inquiries at the American ticket counter at Burbank to determine time of arrival. Other inquiries were made of American agents at

Los Angeles concerning an \$80 fare from Los Angeles to New York, which the persons had heard advertised on television, and upon investigation it was found that it was North American they were referring to and not American. One witness testified that she had heard people state that they were under the impression that North American and American were the same or affiliated companies. Another witness for American testified that one person insisted that American flew from New York to Miami because she had heard a radio program to that effect, whereas the program in question was that of North American. There were instances where mail addressed to North American was delivered to American Airlines' office. Tradesmen have

806 duined American for bills owed by North American and hotels have requested American's advice as to billing for hotel charges incurred by North American crews. A witness for American stated that at its Burbank office the president of North American, who is on duty at the North American ticket counter at Lockheed air terminal, informed her that many persons would stop at his counter and request tickets to Dallas, Oklahoma City, or Tulsa, points which North American did not serve, and he would realize that the passengers were confused and that they were under the impression it was American's ticket counter. The president further stated to the witness that if the passengers were destined to New York or Chicago he would do everything he could to "steal" them.

There were many other instances similar to those referred to above that need not be repeated here. In general, they indicate that certain confusion exists on the part of the public in distinguishing the services of the two airlines in question.

The witnesses who appeared and testified on behalf of North American were ticket agents from Burbank and Washington, D.C. Their testimony was to the effect that they had not experienced any great degree of confusion on the part of the public involving the similarity of names between American and North American. The agent at Burbank stated it was a common occurrence at his counter for persons to inquire about the services of other carriers

such as United and particularly the services of North Star—in fact, the witness had noticed a certain amount of confusion existing on the part of the public between North American and North Star. Another witness for North American stated that his experience had been that the majority of customers made inquiries concerning destinations of the various carriers and were not particularly confused about the similarity of names of the carriers.

807 *Discussion.*—Section 411 of the Civil Aeronautics Act empowers the Board to determine whether any air carrier or ticket agent has been engaged or is engaging in unfair or deceptive practices, or unfair methods of competition in air transportation or the sale thereof, and if such is found to exist the Board is empowered to order discontinuance of such practices.

This case finds no precedent in the Board's decisions. Therefore, one must look for guidance to the decisions of the courts in their application of unfair trade practices as set forth under section 5 of the Federal Trade Commission Act, which is essentially the same as section 411 of the Civil Aeronautics Act. The Federal Trade Commission has been given the jurisdiction by statute over unfair competition in the common law sense of the term and also under the statutory language as defined "any unfair method of competition or unfair or deceptive act or practice in commerce." It is noted that the word "act" in the Federal Trade Commission Act has been omitted in section 411 of the Civil Aeronautics Act.

The courts have said that the unfair trade practice law is for the protection of the public and not for the experts, but rather for "the vast multitude which includes the ignorant, the unthinking, and the credulous, who in making purchases do not stop to analyze but are governed by appearance and general impressions."¹

The most common form of unfair competition is the imitation of a trade name, trade symbol, or device by a competitor. This may be a family name or the name of a corporation, labels, or deceptive packaging. In the early history

¹ See *Florence Mfg. Co. v. J. C. Dord & Co.*, 178 F. 73; *Stork Restaurant, Inc., v. Sahati et al.*, 166 F. 2d 348.

of trade relationship, as indicated by the early legal cases, it included unfairness, dishonesty, taking unfair advantage of a rival, misrepresentation, and defrauding the public. It is also noted that running through all of these early cases were the ethical element standards.² One of the first court cases involving a trade-mark or trade name in American courts was *Taylor v. Carpenter*,³ Story 458, in which an English concern complained that the name and other distinguishing devices on its spools of thread had been copied. Judge Story said that the case was one of unmitigated and designed infringement of the rights of the plaintiff for the purpose of defrauding the public and taking from plaintiff the fair earnings of their skill, labor and enterprise.

As heretofore stated, the name under which one does business may be a family name, a descriptive name, a fanciful name, or a geographical name. In this case the word "American" is used to designate a particular airline and as such is subject to exclusive use, although it is a geographical term. The courts have held that where the use of a name has been given significance or other meaning, such meaning is called a "secondary meaning" and the statute of unfair competition gives such name a property right.³

In the case of *Hudson Tire Co., Inc. v. Hudson Tire & Rubber Corporation et al.*, 276 F. 59, the court stated that the word "Hudson" as applied to tires had obtained a secondary meaning, referring to plaintiff's merchandise, and the fact that defendant had secured its corporate name from the State of New York did not authorize it to use the name "Hudson" in connection with such merchandise.

809 The courts have likewise held that in looking for a secondary meaning in a trade-mark, it is controlled by the fact that such a meaning has been acquired in the minds of the public rather than by the time it has taken for that fact to be established.⁴

Another case in point is that of *American Products Co.*

² 2 Mims' Unfair Competition, 4th ed., 1947.

³ *Standard Paint Co. v. Rubberoid Roofing Co. et al.*, 224 F. 695.

⁴ *Barton et al. v. Rex-oil Co., Inc.*, 2 F. 2d 402.

vs. American Products Co., 42 F. 2d 488. It is noted that one of the above companies was a Delaware corporation and the other one a Michigan corporation. The court said, in part:

“Assuming, for the purposes of this opinion, that the name ‘American Products Company’ should be regarded as a geographical name indicating products made in America, rather than a somewhat fanciful name not intended to denote the place of manufacture of such products, it is well settled that when a person has adopted, as the name of a business, a term originally geographical, and, by his efforts and expenditures, has developed a reputation and good will for such business and its products, so that such name has come to mean, in the minds of the general public, that particular business and its products, such name thereby acquires a secondary meaning, as indicating such business, and its owner is entitled to protection, in its use, by a court of equity.”

In the case of *American Radio Stores, Inc. v. American Radio and Television Stores Corp.*, 150 A. 180, the court stated:

“Those words (radio and stores) are purely descriptive and, when used by the complainant, have attached to them no meaning of a secondary nature. But when the word ‘American’ is used in conjunction with them, a distinguishing mark is introduced and the complainant is entitled to be protected in its use of that distinctive feature of its name.”

In the case of *Delaware L. & W. R. Co. v. Lackawanna Motor Freight Lines*, 175 Atl. 905, the court held that the rights of the plaintiff were based on a secondary meaning acquired by its use in the transportation business, and its use by defendant was a device to deceive the public, although the court held that fraudulent intent need not necessarily be shown to invoke the aid of the court.

810 Another case in point is *American Thread Co. vs.*

North American Thread Co., Inc., 33 F. Supp. 616, where the court held that a newcomer operating under a similar name to a company already in the business was an act of unfair competition.

Another pertinent case is that of *Womble v. Parker*, 67 S.E. 2d 133, which involved a newcomer into a business wherein it attempted to advertise its products under a trade name similar to one already in use by its long-established competitor. The court said, in part:

“While geographical names and words which are merely descriptive are not generally the subject of exclusive appropriation as trade-marks or trade names, such names and words when used so long and exclusively by a trader, manufacturer or producer that they are generally understood to designate his business or merchandise, may acquire a secondary signification or meaning indicative not only of the place of manufacture, but of the name of the manufacturer or producer, or of the character of the product, so that the name or title thus employed, including the geographical name and descriptive words, may be the subject of protection against unfair competition in trade, and authorize equity to enjoin a newcomer competitor from the appropriation and use of a trade name or trade-mark bearing such resemblances to those of the pioneer as to be likely to produce uncertainty and confusion, and to pass off the goods or business of one as those of another.”

It is clear from the foregoing that a geographical term used in a business name may acquire a secondary meaning by actual use and upon which the owner may create goodwill in its business relationship with the public. Thus such a name becomes a valuable asset and a business advantage.

⁵ Other cases in point are: *Phillips v. The Governor & Co. of Adventurers of England trading into Hudson Bay*, 79 F. 2d 971; *Lincoln Motor Co. et al. v. Lincoln Automobile Co.*, 44 F. 2d 812; *Finchley, Inc. vs. Finchley Co., Inc.*, 40 F. 2d 736; *Western Auto Supply Co. v. Knox*, 93 F. 2d 850.

Therefore, in such instances the trade name becomes of a pecuniary value or a property right, and the courts have consistently held that such rights are entitled to the protection afforded by the courts.

811 There can be no dispute that American Airlines is the prior user of the name "American" as between it and North American, as American has used the above name since 1934 and its predecessor used the name prior to that time, whereas North American has used its name only since April, 1951. American has consistently over the years promoted the use of the term "American" in its advertising and public relation work. Since 1948 American has spent over \$6,000,000 for advertising in newspapers and magazines alone. Respondent argues on brief that in order for the term "American" to have acquired a secondary meaning as used by American Airlines it must have been exclusively used during the entire period in which the secondary meaning was being established, and the respondent further argues that American was not the exclusive user of the name "American" during this time.

The courts have held that to establish a cause of action for unfair competition it is not necessary to prove an exclusive right in plaintiff, i.e., that no one else has used the trade name in the past or that no one else is presently using it—rather the issue is what does the trade name as used by the owner mean to the public.⁶ The public has accepted the term "American" in air transportation as meaning American Airlines, Inc., and the fact that other airlines may or may not have used the word "American" as constituting a dominant part of their business name is of no significance in this proceeding.

Upon consideration of all the facts, and in view of the court decisions pertaining thereto, it is concluded that the name "American" and "American Airlines" used in connection with air transportation has acquired a secondary meaning as identifying American Airlines, Inc.

812 The Supreme Court has said that the aim in the use of trade-marks is to convey to the minds of the

⁶ *Thomas A. Edison, Inc., v. Sholkin*, 69 F. Supp. 176.

public, or potential customers, the desirability of the services or commodity upon which the mark appears, and once this is attained the trade-mark becomes something of value and whatever tends to dissociate the trade name or mark in the public mind from the goodwill it identifies lessens its value and may destroy it altogether.⁷ Since it has been concluded that the trade name "American" used by American Airlines has acquired a secondary meaning and that good-will has been created in the use of that name, it appears that such name is entitled to protection against its use by another person engaged in air transportation under a similar name which would have a tendency to confuse the public.

One of the important factors in a case of this kind arising under section 411 is whether the public is being deceived or confused and thus affecting the public interest in air transportation. The court stated in the case of *Anheuser-Busch, Inc. v. Budweiser Malt Products Corporation*, 287 F. 243, that the fundamental question in cases of trademarks or unfair competition is whether the public is being misled and deceived so that the defendant is in effect taking advantage of the good-will and business reputation of another who has built it up through service or advertising.⁸

There are numerous examples in the record indicating confusion between American and North American Airlines on the part of the public. A number of witnesses who were ticket or reservation agents for American testified that they had received numerous inquiries from the public, indicating to them that confusion existed in the minds of the persons making the inquiries. Each agent for American in the Los Angeles area that testified stated he had received on an average of two or more such inquiries per week, and it is reasonable to assume that the other employees in that area received an equal number of

⁷ See *Mishawaka Rubber & Woolen Manufacturing Co. v. S.S. Kresge Co.*, 316 U.S. 203.

⁸ See *United Drug Company v. Theodore Rectanus*, 248 U.S. 90.

inquiries, which would make the total over 200 per week in the above area alone, not to mention the other points located on American and North American's systems.

Respondent has raised the point as to whether inquiries contained in sworn affidavits by American employees should be given any consideration since, for the most part, such evidence is hearsay and the respondent was not given an opportunity to cross-examine the person making the statement. The above evidence was not offered to prove the truth of such statements but rather the extent of confusion which may exist in the minds of members of the public. The mere fact that such inquiries were made is some indication that the persons making the inquiries must have been confused by the similarity of names.

The courts have consistently held that such evidence in cases involving infringement of trade-marks is admissible. In the case of *S.C. Johnson & Son, Inc. v. Johnson*, 28 F. Supp. 744, the court said:

"There is considerable testimony which has been offered by the plaintiff purporting to show inquiries made by prospective purchasers. It is objected that such inquiries are hearsay. Without this type of proof, it would be difficult to show confusion. It seems to me it is competent as showing the state of mind of the prospective purchaser."

As to whether the incidents included in the affidavits submitted in evidence were made by passengers or prospective passengers on either of the two airlines involved 814 is of no significance since a part of the entire public are prospective passengers at one time or another. The courts have held that misdirected mail or complaints between companies with similar names was evidence of confusion.

The type of inquiries indicating confusion involved in this proceeding, which have heretofore been discussed, is

² See also *United States v. United Shoe Machinery Corporation*, 89 F. Supp. 349; *Federal Trade Commission v. Cement Institute et al.*, 333 U.S. 683.

typical of those occurring to the average member of the public. Naturally, such inquiries were not made by persons who are frequent travelers by air or well informed on aviation matters but rather the uninformed, and it is the interest of the uninformed that the Board is required to protect from confusion because of similarity of names.

There is no evidence of record that North American adopted its name with intent to deceive the public or trade upon the good-will and business reputation of American, or that American has been injured by such operation. Such evidence is not required to support a finding of unfair competition. The courts have consistently held that in cases involving violation of trade-marks the right of injunction depends not on the fact that the purchaser has been deceived but rather on the fact that the public may be deceived if such acts of confusion are permitted to continue. The proof that confusion has already existed adds to the likelihood of continued deception.¹⁰

815 There is no question but what American has acquired during the past 20 years through its constant efforts a good-will in its use of the name "American" or "American Airlines," which has become a valuable asset to be protected. However, an action for infringement of American's trade name can find its remedy in the courts. Section 411 was not designed for the purpose of protecting the private rights of an individual carrier except to the extent of regulating competition between the various air carriers to assure fair competition and thereby maintain a sound economic transportation system; also, equally im-

¹⁰ *J. C. Penney Co. v. H. D. Lee Mercantile Co.*, 120 F. 2d 949; *Ralston Purina Co. v. Saniwax Paper Co. et al.*, 26 F. 2d 941; *Wisconsin Electric Co. v. Dumore Co.*, 35 F. 2d 555; *Henry Muks Co. v. Farm Craft Foods, Inc., et al.*, 37 F. Supp. 1013; *United Drug Co. v. Obear-Nester Glass Co.*, 111 F. 2d 997; *Pep Boys—Manny, Moe & Jack, Inc. v. Federal Trade Commission*, 122 F. 2d 158. *American Home Benefit Assn., Inc. v. United States Benefit Assn., Inc.*, 125 P. 2d 1010; *United Lace & Braid Mfg. Co. v. Barthels Mfg. Co.*, 221 F. 456.

portant, the Board was given the responsibility of safeguarding the public interest against unfair and deceptive methods of competition.

North American is a newcomer in the field of air transportation as compared to American's operations; and it should have known that the similarity of names between North American and American would have the capacity to confuse the public as to the true identity of the carriers. There are numerous instances of record where the public has been confused and inconvenienced by this similarity of names. The courts have consistently upheld the public interest as being the foremost issue in cases involving violation of trade-marks and have granted injunctive relief without proof of fraud, deception, or injury to the owner of the trade-mark.

The task would not have been a difficult one for North American to have adopted another trade name which was different from the names of other air carriers in operation and thereby avoid the tendency on the part of the public to mistake one carrier for the other.

In view of the public confusion which has arisen and may increase in the future as air transportation becomes a more accepted mode of travel, and the services rendered by the carriers become more alike as well as the aircraft itself, it is in the public interest that the identity of the carrier be readily distinguishable by the public. Therefore, the continued use of the name "North American" by Twentieth Century is so similar to the trade name "American" as used by American Airlines, Inc., as to constitute an unfair and deceptive practice as well as an unfair method of competition, and it is so found.

In order further to protect the public interest against such unfair methods of competition it is found that a cease and desist order should be issued by the Board against the use of the name "North American" by Twentieth Century in the manner hereinafter set forth.

Findings.—In view of the foregoing and in consideration of all the facts of record, it is found:

1. That the use of the name "North American Airlines, Inc.," "North American Airlines," "North American," or

any combination of the word "American" by Twentieth Century Airlines, Inc., constitutes an unfair or deceptive practice and an unfair method of competition within the meaning of section 411 of the Act.

2. That the public interest requires that the application of Twentieth Century Airlines, Inc., Docket No. 5774, for authority to engage in air transportation under the name North American Airlines, Inc., be denied.

3. That a cease and desist order be issued against Twentieth Century Airlines, Inc., its successors, assignees, representatives, agents, officers, and employees, to cease and desist doing business in air transportation under the name North American Airlines, Inc., or any variation of the name "American."

* * * * *

1036

E-7870

UNITED STATES OF AMERICA CIVIL AERONAUTICS BOARD

Washington, D. C.

Served: Nov 4 1953

Docket Nos. 5774 and 5928

North American Airlines Section 411 Proceeding

Decided: November 4, 1953

North American Airlines, Inc. (Twentieth Century Airlines, Inc.) ordered to cease and desist from engaging in air transportation under the names "North American", "North American Airlines", "North American Airlines, Inc.", or any combination using the word "American".

Appearances:

Hardy K. Maclay and Walter D. Hansen for North American Airlines, Inc.

Howard C. Westwood, Ernest W. Jennes and Clifton J. Stratton, Jr., for American Airlines, Inc.

Robert M. Johnson, Enforcement Attorney.

OPINION

By the Board:

This proceeding involves an investigation instituted by the Board to determine whether North American Airlines, Inc., formerly Twentieth Century Airlines, Inc. (respondent) has been and is violating Section 411 of the Act by engaging in air transportation under the name North American Airlines, Inc., North American Airlines, or North American.¹ The order instituting the investigation 1037 consolidated into it an application by respondent, filed under section 291.28 of the Economic Regulations, for authority to conduct its operations under the name North American Airlines, Inc., rather than as Twentieth Century Airlines, Inc., the name in which respondent holds its letter of registration as a large irregular air carrier. American Airlines, Inc. (American) was granted leave to intervene.²

After due notice a public hearing was held before Examiner Walter W. Bryan who has issued his Initial Decision. In it he found (a) that respondent's use of the name North American Airlines, Inc., North American Airlines, North American, or any combination of the word American constitutes an unfair or deceptive practice and an unfair method of competition within the meaning of section 411 of the Act, (b) that the public interest requires denial of respondent's application to engage in air transportation under the name North American Airlines, Inc., and (c) that respondent, its successors, assignees, representatives, agents, officers and employees should be ordered to cease and desist from engaging in air transportation under the name North American Airlines, Inc., North American 1038 Airlines, North American, or any combination of the word American. Respondent has excepted to the Initial Decision.³ The Board has heard oral argument, and the case now stands submitted for decision.

¹ Order No. E-7107, dated January 28, 1953.

² Order No. E-7174, dated February 19, 1953.

³ Respondent has filed a brief in support of its exceptions. American filed a statement in lieu of exceptions approving

Upon consideration of the entire record, we agree with the Examiner's ultimate findings as set forth above. Those portions of his Initial Decision which we adopt as our own are attached hereto as an appendix. We shall discuss herein some of the contentions raised in respondent's exceptions, and in so doing we shall supplement the findings and conclusions contained in the appendix.

1. Respondent presents several exceptions attacking the sufficiency of the evidence of record to establish that respondent has caused substantial public confusion between itself and intervenor by using the names North American, North American Airlines, or North American Airlines, Inc. The Examiner found that such confusion exists by reason of the similarity between North American and the word American as used by intervenor. We concur in this finding. In addition, we find that substantial public confusion exists due to similarity between respondent's names and the name American Airlines. Evidence supporting these findings is partially summarized in the appendix. We have examined the evidence in the light of respondent's attacks upon both its weight and its admissibility, as discussed below, and have determined that the record amply supports our findings.

Respondent assails both the admissibility and the weight of evidence of confusion introduced in the form of written statements by certain American reservations and ticket office employees who were not called as witnesses. It is true that virtually all of the evidence of public confusion in the Chicago area is of this nature. But the finding of substantial confusion is required by the abundant testimony and written statements as to public confusion in the New York and Los Angeles areas personally observed by at least seven⁴ witnesses who were extensively cross-examined

the Examiner's ultimate findings, with a brief to the Board in support of its position. Counsel for the Board's Office of Enforcement filed no exceptions but requested the Board to consider his brief to the Examiner.

⁴ Witnesses Newkirk, Perry, Rowley, Avery, Heide, Houek and Reynolds; also witness Burg.

upon their testimony and statements. In finding substantial public confusion, we do not depend or rely upon the corroborative value of the evidence respondent thus assails. Indeed, all our findings and conclusions in this proceeding are based only upon evidence given by persons appearing as witnesses and available for cross-examination.

2. Respondent contends that the Examiner improperly relied upon evidence of confusion on the part of persons who were not shown to have been prospective buyers of air transportation at the time they evinced confusion. Such evidence related to attempts of merchants, hotels, and others to hold American Airlines answerable for the obligations or acts of respondent. Respondent views our inquiry as confined to the question of whether *shoppers for air travel* will be confused, and asserts that such confusion is not established by the evidence in question.

Even assuming that our concern is directed only to confusion of prospective passengers,⁵ evidence of confusion of members of the public not so identified does not lack probative force. There is no reason to believe that those who as creditors confused respondent with intervenor are more prone to such confusion than prospective air travellers. The evidence here challenged by respondent corroborates the direct evidence of confusion on the part of the travelling public. Indeed, such creditors may be themselves prospective air travellers.

3. The bulk of the confusion shown in the record was on the part of persons reasonably identified as prospective or actual purchasers of air transportation. In attacking this evidence, respondent argues that the showing of confusion due to similarity of names actually represented confusion which the witnesses had imputed to, rather than observed

⁵ Obviously the public to whose interests we must look herein does not consist solely of individuals contemplating purchase of air transportation. For example, the record shows that a person whose sole transportation interests at the time may lie in the journey of another can experience considerable inconvenience if under a misapprehension as to the carrier's identity and time and place of arrival.

in, the public. Respondent claims that the public behavior observed by these witnesses, properly interpreted, indicates either (a) no confusion on the part of the traveller or caller at all, or (b) confusion involving some carrier other than respondent, or (c) confusion between respondent and
1041 intervenor not attributable to a similarity of names.

(a) The record contains few instances where it would be reasonable to conclude that the caller was not confused at all. Respondent would so describe persons who presumably were trying to telephone respondent but who in fact telephoned American possibly because of a wrong number. But absent a showing of a confusing similarity of telephone numbers, receipt by American of telephone calls intended for North American is itself some evidence of a confusion due to similarity of names. Respondent also regards as not confused persons who apparently called American intentionally and who, according to respondent, did so merely because they regarded American as a good source of desired information. While there is no dispute that such calls are received by American, very few of the instances described by the witnesses were even arguably of this nature.⁶ The evidence as a whole is convincing that in almost all instances offered to show confusion of the public, confusion was definitely or very probably present.

(b) In certain instances respondent does not deny that confusion may have been present, but argues that the caller or traveller whom the witness observed may have confused American with some air carrier other than North American. This argument is inapplicable to a major portion of the cases reported by the witnesses, because the conduct
1042 of the persons observed directly exhibited that North American was involved. The argument is unpersuasive in other instances which were indirectly linked to

⁶ This finding is made with full cognizance of certain evidence in the record showing that intervenor does receive general inquiries regarding air transportation where there is no confusion. Respondent improperly attempts to classify as inquiries of this character requests which we conclude involve confusion.

North American by references to North American flight numbers or advertising, including in one case the name of a radio entertainer sponsored by respondent. It is true that the link to respondent is imperfect where it consisted merely in references by the caller to special fares, particular destinations and distinctive features of service shared by carriers other than respondent. However, such cases are overshadowed by the evidence in which North American's role in the confusion is obvious.

(c) Respondent disputes the causal relationship between the similarity of names and the public confusion between the carriers using such names. Respondent cannot successfully challenge such a relationship on this record. That there is in fact a similarity between the names of respondent and intervenor is obvious, and where the evidence shows members of the public have confused respondent with intervenor, the implication is strong that such confusion flows from the similarity. The record will not permit us to draw a contrary inference. It has not been shown that comparable public confusion exists between intervenor and a carrier with a clearly dissimilar name, nor between respondent and a carrier with a clearly dissimilar name. Moreover, respondent is unable to point to any prevailing circumstance more likely than the similarity of the parties' names to account for the confusion between itself and intervenor. In one case, in which a letter addressed to American Airlines at the Lockheed Air Terminal in Burbank, California, was
1043 misdelivered to respondent's counter at the same terminal, respondent urges as the probable reason that the letter bearing the name of an American Airlines' employee, Miss Newkirk, beneath that of American Airlines, was misdelivered because respondent also had an employee named Newkirk. But this single instance affords respondent little aid in view of the evidence that there were other instances of letters both misdelivered and misaddressed as between American Airlines and North American. In these cases there was no evidence of similar personal names, and the conclusion that the similarity in the carriers' names was the causal factor can hardly be avoided.

4. Respondent contends that any instances which may

show a confusing similarity of names are too few to support a finding that such confusion is substantial or widespread. Respondent attacks a statement of the Examiner that it would be reasonable to assume on the basis of the evidence that American Airlines' personnel in the Los Angeles area receive 200 inquiries a week involving confusion on the part of the public. Respondent asserts that the evidence shows there were 8 instances a week of allegedly confusing inquiries received by American Airlines in that area, including only one which respondent concedes may have in fact involved actual confusion due to similar names. Respondent thus contends that any confusion caused by the similarity of names is *de minimis*.

The fact is that such confusion has been shown by the evidence of record to be substantial. We need not determine whether to endorse the precise numerical estimate of the Examiner, but we must reject respondent's assertion that American Airlines' Los Angeles personnel received only 8 inquiries per week involving confusion. That figure refers to certain reports by American Airlines' personnel committed to writing under the instructions of their supervisor who testified that for some time past instances of confusion with respondent had been frequently brought to his attention by his subordinates. He also testified that the reports, including those made by other witnesses, were representative of such instances; that some reports which he did not consider completely illustrative of the problem were discarded; that the instructions did not call for reporting all instances as that would have been an impossibility, since the personnel in question were busy answering telephones and handling many customers; and that his instructions called for reports of specific instances of unusual confusion or of a particular type of confusion which had happened repeatedly. The testimony of the American Airlines' ticket counter and telephone reservation personnel in Los Angeles and New York indicates the frequency of the confusion, or of one particular type of confusion, observed by individual witnesses as daily, practically daily on the night shift, three or four times a week, five or six in a five-day week, three or more a week, etc.

Such indications are cumulative rather than duplicative as to number, and since the witnesses testified as to observations made in work performed by them as a part of a much larger force also so occupied, their observations can be taken to represent only a small part of such occurrences.

This is confirmed by the testimony of American's 1045 supervisory witnesses from New York and Los Angeles, that public confusion involving respondent had come to their attention for some time as a problem which they encountered as supervisors.

5. Respondent has taken the position that, apart from the question of confusion, we cannot find a violation of section 411 herein because the word American as used by intervenor in air transportation did not acquire a secondary meaning referring to intervenor. We concur in the Examiner's finding and conclusion to the contrary. The evidence establishes that intervenor has long engaged in extensive advertising of its services in the name of "American". This practice has helped to instill in the minds of the public the notion that the word "American" when used in connection with domestic air transportation denotes American Airlines. This is dramatically illustrated by the fact that intervenor has been and is commonly referred to in news items in the public press as American. Where, as here, the record shows that the public press identifies "American" with the intervenor, and believes that the reading public makes the same identification, we find strong evidence of secondary meaning in the word "American."

In finding the secondary meaning, we have not overlooked the recent use of the word American in the name of the sectional local service carrier All American Airways, which has since changed its name to Allegheny Airlines. Nor have we overlooked the recent use of the word American in the name of the irregular carrier Air America, 1046 against whom an enforcement proceeding⁷ involving its name is now pending before us. We have also considered the use of American in the name Pan American World Airways. There, the use occurred in the separate

⁷ Docket No. 6078.

field of international and overseas air transportation, from which intervenor is wholly excluded except to the extent of serving Mexico City. The fact that intervenor in its long history of extensive advertising may have, at times, emphasized the word "flagship" more than it emphasized its name does not destroy the continuity of its use of that name. There is no doubt that the word American, used in connection with domestic air transportation, is widely known as meaning the intervenor, and that the phrase American Airlines is also understood to refer to intervenor and not to denote the airlines of this nation or continent generally.

Even if respondent were correct in its arguments as to secondary meaning, we do not interpret section 411 so that respondent would prevail. We do not believe that, in a case like the present, secondary meaning must be proven in order to protect the public against a clearly demonstrated and substantial public confusion. And this is certainly true where, as here, respondent has adopted a corporate name confusingly similar to the earlier adopted corporate name "American Airlines."

Respondent asserts that its use of its name has not been shown to have been fraudulent. Respondent did not commence and develop its operations as North American Airlines under circumstances of time, place, or nature and scale of operations in which confusion with intervenor would have seemed a remote prospect, but rather changed its name from Twentieth Century Airlines to North American Airlines at a time when American Airlines was universally known in air transportation circles and when operations between major cities served by American must have loomed large in respondent's contemplation of its future activities. Under the circumstances, it was obvious that the similarity of names might well cause confusion. Respondent must be presumed to have intended the reasonably foreseeable consequences of its own acts. We find that respondent's use of a confusingly similar name was not accidental or inadvertent, but rather was knowing.⁸

⁸ There is some evidence which, literally read, would support a finding that respondent used its name in order to

We are well aware that an order requiring respondent to cease and desist using the name under which it has been engaging in air transportation is a serious sanction which necessarily involves disturbance and loss to the carrier. We do not impose such a measure lightly. But the record is convincing that the public interest requires this action in order to prevent further public confusion between respondent and intervenor due to similarity of names. The main-

tenance of high standards in dealing with the public
1048 is expected of common carriers, and the public has a

right to be free of the inconveniences which flow from confusion between carriers engaging in the transportation of persons by air. The speed of air travel may well be diminished when passengers check in for flights with the wrong carrier, or attempt to retrieve baggage from the wrong carrier, or attempt to purchase transportation from the wrong carrier, or direct their inquiries to the wrong carrier. Friends, relatives or business associates planning to meet passengers or seeking information on delayed arrivals are subject to annoyance or worse when confused as to the carrier involved. The proper handling of complaints from members of the public is impeded by confusion as to the carrier to whom the complaint should be presented. The transportation itself may differ from what the confused purchaser had anticipated (e. g., in terms of equipment),

secure for itself prospective passengers of intervenor. Moreover, there is other evidence, introduced by respondent, clearly showing the regular use by respondent of misleading advertising concerning itself. This evidence shows that respondent's radio commercials regularly contain the words "North American—one of the nation's four great airlines". Clearly the word great, used to describe a commercial enterprise such as an airline, would normally be understood in its usual sense of big or large. By no objective criteria is the quoted claim, so interpreted, even close to being true of respondent. American Airlines, however, by most if not all tests of size is in fact one of the four largest domestic air carriers, a group commonly referred to as the "Big Four".

even though the time and place of arrival may be about the same. It is obvious that public confusion between air carriers operating between the same cities is adverse to the public interest, and we have determined that the public should be protected from the effects of the confusion shown on the record by eliminating what we find to be the 1049 cause of such confusion.⁹

We have considered the remaining contentions of respondent in support of its exceptions and find them without merit.¹⁰

⁹ Respondent cites certain orders issued in Docket No. 4776 (Ralph Cox, Jr. d/b/a Ocean Air Tradeways) as a precedent under section 411 to the effect that actual injury to the intervenor must be shown before the Board can act under that section. We do not so read these orders (Nos. E-4990 of December 29, 1950, E-5897 of November 28, 1951, and E-6778 of September 10, 1952), for it appears that the complainant in that case, Overseas National Airlines, proceeded on a claim of purely private rights but failed to allege facts showing any injury from violation of such rights. Furthermore, substantially all of the business of the other carrier, United States Overseas Airlines, was under contracts with the military establishment, rather than with the general public. These orders by no means imply that where the public interest may be adversely affected by a confusing similarity of names the Board before acting under section 411 will require a showing of actual injury to the private complainant who asserts a right in such a name.

¹⁰ Respondent excepts to the Examiner's statement that the issues herein include the question of whether granting respondent's application for leave to change its name to North American Airlines, Inc., would be contrary to the public interest. Respondent asserts that under the order instituting the investigation the sole issue was stated to be the violation of section 411 by the use of the name North American, etc., that this delineation of the issues was reaffirmed both in an order denying intervenor's motion to clarify and broaden the issues and in the prehearing confer-

Respondent also excepts to the Examiner's statement that the courts have consistently upheld the public interest as being the foremost issue in cases involving violation of trade-marks and have granted injunctive relief without proof of fraud, deception or injury to the owner of the trade-mark. We have not adopted the Examiner's statement and accordingly need not comment further on that subject.

Accordingly, in view of the foregoing and upon consideration of the entire record we find:

1. That American Airlines and North American Airlines are in competition in air transportation;

2. That American Airlines was incorporated under that name before North American adopted the trade name of, or changed its corporate name to, North American Airlines; that the term "American" had acquired a secondary meaning before North American adopted that trade name or so changed its corporate name, and such secondary meaning continues to exist;

1050 3. That the substantial public confusion found herein is likely to continue;

4. That the use by respondent of the name "North American Airlines, Inc.", "North American Airlines", "North American", or any combination of the word "American"

ence report, and that the Examiner's addition of a new issue after hearing deprived respondent of notice. There is no doubt that respondent's application was consolidated herein by the order initiating the investigation under section 411 (No. E-7107 of January 28, 1953) and was referred to as such in the prehearing conference report. However, we agree with respondent that the only issue in this proceeding is whether there has been a violation of section 411. For, under the regulation regarding change of name under which respondent's application was filed, as interpreted by the order initiating the investigation mentioned above, a denial of the application may be ordered only if a violation of section 411 is shown. Thus the issues under respondent's application and the Board's order of investigation herein are identical.

constitutes an unfair or deceptive practice and an unfair method of competition within the meaning of Section 411 of the Act;

5. That the public interest requires that the application of respondent, Docket No. 5774, for authority to engage in air transportation under the name North American Airlines, Inc., be denied;

6. That respondent and its successors, assignees, representatives, agents, officers, and employees should be ordered to cease and desist from engaging in air transportation under the name "North American Airlines, Inc.", "North American Airlines", "North American", or any combination of the word "American".

An appropriate order will be entered.

Ryan, Chairman, Denny, Vice Chairman, Lee and Gurney, Members of the Board, concurred in the above opinion. Adams, Member, filed the attached dissenting opinion.

1052 Adams, Member Dissenting:

I dissent from the action taken by the majority since I do not agree with their application to this case of the law of unfair competition nor with the particular sanction they have imposed upon North American Airlines, Inc. I feel that neither our Office of Enforcement nor the intervenor, American Airlines, Inc., has successfully borne the burden of proving the existence of unfair competition since in my view, although some public confusion has been demonstrated, I do not agree that it is substantial, or more than temporary.

As I read the leading cases on the subject of unfair competition, I feel that the error made by both the examiner and the majority arises from their tendency, on the one hand, to ignore the basic common law of competition and that of secondary meaning; while on the other hand they over emphasize the gullibility of the average purchaser in this country and magnify the significance and degree of public confusion shown on the record of this case. With this as a basis, the majority concludes that the name "American" has acquired a secondary meaning in the public mind, denoting only American Airlines, Inc.; that sub-

stantial public confusion exists and is likely to continue; and that, therefore, American Airlines, Inc., must be protected from the use by respondent, North American Airlines, Inc., of the word "American" as any part of its business name.

Since American Airlines, Inc., carries approximately 5½ million passengers each year over its system, I am not impressed with the fact that witnesses in this case (principally those employed by American Airlines itself) have testified that some confusion has existed between the services offered

by American, on the one hand, and North American on the other. On the contrary, I would be greatly surprised, (in view of the several million phone calls and other communications which American Airlines receives every year over and above those received from passengers which it actually carries) if there were not some demonstrable public confusion between American Airlines and the respondent in this case. As I read the law, however, a new "competitor" is not required to insure against any and all confusion which its entry into the field may cause to certain uninformed purchasers.

When considered in the light of the facts before us in this case, the following excerpts from court decisions bearing on the matter of public confusion and the extent of that confusion required to support injunctive relief are pertinent:

"The issue in such a case as this is 'whether an appreciable number of prospective purchasers of the goods . . . are likely' to be confused. 'That a few particularly undiscerning prospective purchasers might be so misled is not enough.'"

Eastern Wine Corp. v. Winslow Warren Ltd., Inc., 137 F. 2d. 955, 960 (1943).

In the *Life Savers Corp. Case*,¹ just as in the case before us, some confusion was actually shown. The Circuit Court, however, quoted the trial court and agreed that "... it is

¹ *Life Savers Corp. v. Curtiss Candy Co.*, 182 F2d 4, 8 (1950).

just as probable that the confusion can be attributed to the size and shapes of the various packages as to the exact wording and coloring of the labels". In that same case, in view of the tremendous volume of sales the court said, "It would be extraordinary if some confusion could not be found irrespective of the details of the dress of the package".

Although both the examiner and the intervenor here have cited the *Florence Manufacturing Case*² and the language therein to the general effect that the ignorant, unthinking and credulous public must be protected by the law of unfair competition, other authoritative cases take a different view. The same court which decided the *Florence Case* had the following to say 33 years later on the matter of unduly protecting the interest of the businessman:

"The failure to keep constantly in mind the divers policy considerations which, in this legal province, come in conflict with one another and the consequent occasional over-emphasis on but one of them—the protection of the interest of the businessman who has built a business around a name—has sometimes led to decisions unduly extending the confines of name-monopolies. For a time the courts were remarkably generous in fixing the boundaries of such monopolies. Today the tendency is to be somewhat less generous. (*Durable Toy & Novelty Corp. v. J. Chein & Co.* 133 F2d 853, 1943) We approach the case at bar, then, having in mind the basic common law policy of encouraging competition and the fact that the protection of monopolies in names is but a secondary and limiting policy." (Emphasis added.)

Eastern Wine Corp. v. Winslow-Warren Ltd., Inc., 137 F2d 955, 959 (1943).

In 1943 a District Court in Nebraska had this to say on the matter of the obligation of a new competitor toward the non-discriminating public:

²*Florence Mfg. Co. v. J. C. Dowd & Co.*, 178 F. 73 (1910).

"Upon this branch of the case the law is settled that competition is not forbidden but rather unfairness in competition, and that the essence of actionable unfairness in competition is the creation by one come newly into a competitive field of a situation that is reasonably calculated to result in the passing off of his goods as those of his competing predecessor in the market. Again, *the new competitor is not held to the obligation of an insurer against some confusion*, but is required only to use reasonable care to inform the public of the source of his product, to use every reasonable means to prevent confusion. *Pointedly, he is not obliged so to guard his competitive methods that even the negligent or inattentive purchaser will be protected from confusion. As the cases in some instances have*

1055 *put it, he is not required to make the market 'fool proof'.*" *Skinner Mfg. Co. v. General Foods Sales Co.*, 52 Fed. Supp. 432, 450 (194) (Emphasis added)

The thorough-going analysis of the law made by the District Court in this case was commented upon with approval by the Circuit Court on appeal³ and certiorari was denied by the Supreme Court of the United States. Even more recently, in 1950, the Court of Appeals for the 7th Circuit made this pertinent observation:

"A new competitor is not held to the obligations of an insurer against all possible confusion. *He is not obligated to protect the negligent and inattentive purchaser from confusion resulting from indifference . . .* In *Fruit Growers Co-op.*, 170 F2d 834 at page 837, this court said: '*. . . Instead they are required only to mark or designate them in such manner that purchasers exercising ordinary care to discover whose products they are buying will know the truth and not become confused or mistaken . . .*' *Life Savers Corp. v. Curtiss Candy Co.*, 182 F2d 4, 8 (1950). (Emphasis added.)

³ *Skinner Manufacturing Co. v. Kellogg Sales Co.*, 143 F2d 895 (1944) Cert. Denied, 323 U. S. 766.

In light of the foregoing authorities and many others cited in Respondent's briefs and exceptions (and not mentioned either by the examiner or the majority), I conclude that the public confusion or the likelihood of its continuance established in this record is not such that this Board should enjoin Respondent from continued use of its corporate name on the grounds of unfair competition.

Aside from the foregoing difficulties which I have relative to the findings of public confusion in this case, I must also differ with the finding as to secondary meaning made by both the examiner and the majority. This legal doctrine has been clearly defined in several cases, but in no 1056 case do I find that it has been applied to protect the user of a geographical name such as "American", where that user was neither the first nor the exclusive user. As shown by this record, of course, American Airlines can claim to be neither the first nor the exclusive user.

I have carefully examined the thirteen cases upon which the examiner and the majority rely for the finding that the term "American" when applied to air transportation has taken on a secondary meaning so that a new airline must not be allowed to use the term as any part of its business name. In every one of the cases cited the plaintiff prevails under this theory of secondary meaning because *without exception the plaintiff was both the first and sole user of the name involved*.⁴ Furthermore, in eleven of the thir-

⁴ *Hudson Tire Co., Inc. v. Hudson Tire & Rubber Corporation et al.*, 276 Fed. 59 (1921).

Standard Paint Co., v. Rubberoid Roofing Co., et al., 224 Fed. 695 (1915).

American Products Co., v. American Products Co., 42 F2d 488 (1930).

American Radio Stores, Inc., v. American Radio and Television Stores Corp., 150 A. 180 (1930).

Delaware L. & W. R. Co. v. Lackawanna Motor Freight Lines, 175 Atl. 905 (1934).

Barton et al., v. Rex-oil Co., Inc., 2 F2d 402 (1924).

American Thread Co. v. North American Thread Co., Inc., 33 Fed. Supp. 616 (1935).

teen cases the name sought to be used by the new competitor was either identical to that of the first and exclusive user or sounded identical thereto or differed therefrom only by the omission of one letter (viz., "Finchley" as the original name compared with "Finchly" used by the new competitor in the *Finchley Case*). Also in many of the cases cited by the examiner, the courts made specific findings that the second user of the name involved had adopted it with the willful and fraudulent intent to deceive the public (*Standard Paint Case*, *Barton Case*, *Delaware and Lackawanna Case*, and *Finchley Case*)—whereas in the case now before us the examiner made no such finding but, in fact, found that "There is no evidence of record that North American adopted its name with intent to deceive the public or trade upon the good will and business reputation of American."⁵

In other cases cited by the examiner in support of his finding of secondary meaning the courts found, as a matter of fact, truly substantial evidence not only of public deception, but also of actual injury to the trade or profits of the plaintiff. (*Barton Case*, *American Radio Stores Case* and the *Womble Case*.) On this point also the examiner in the case now before the Board has specifically found *no evidence* that American has been injured by North American's operation.

In light of the foregoing distinguishing features of the cases cited from the facts in the present record, I cannot agree that American Airlines has established a secondary

Womble v. Parker, 67 S.E. 2d 133 (1951).

Phillips v. The Governor & Co. of Adventurers of England trading into Hudson Bay, 79 F2d 971 (1935).

Lincoln Motor Co., et al., v. Lincoln Automobile Co., 44 F2d 812 (1930).

Finchley, Inc., v. Finchly Co., Inc., 40 F2d 736 (1929).

Western Auto Supply Co., v. Knox, 93 F2d 850 (1937).

Thomas A. Edison, Inc., v. Shetkin, 69 Fed. Supp. 176 (1946).

⁵ Examiner's Report, page 15.

meaning in the term "American" when applied to air transportation such as to give that carrier an "exclusive" property right to the name or such as to require North American Airlines to be enjoined from further use of that term in its name.

In light of what I have said earlier concerning my differences with the majority on the extent of public confusion actually proven here, I must also dissent from their finding that the similarity of the two names, American Airlines, Inc., and North American Airlines, Inc., is so great as to require us in the public interest to enjoin North American from further use of its corporate name. Although it is not clear from the majority opinion itself whether the finding as to similarity in names is based on evidence of public confusion; or merely upon the comparison of the two names in the minds of the majority without reference to public confusion, I must dissent from their finding on whichever basis the finding of similarity is made.

Finally, even if I did not have the foregoing difficulty with the majority's findings of public confusion and secondary meaning, I would nevertheless have to take this occasion to question seriously the wisdom of the sanction imposed by the majority in this case which, in effect, absolutely prohibits North American Airlines from using the name "American" in any way in its business name. The effect of this prohibition, of course, is to nullify the efforts which that carrier has made and the substantial sums of money which it has expended in building up public good will under that name. I have difficulty in minimizing these serious consequences by simply finding, as the majority does, that North American must be prepared to accept the reasonable consequences of its adoption of its name. Rather than insist on the absolute prohibition against continued use of its name, it would seem reasonable to me that American would be amply protected if North American were required to make more clear in its advertisements and contact with the public that it is not to be confused with American Airlines. This could be done, it seems to me, in any one of several ways, but regardless of the method used, North American would be enabled to

capitalize upon the good will which it has engendered since 1951 under its corporate name.⁶

(s) JOSEPH P. ADAMS.

1060

APPENDIX

EXCERPTS FROM THE INITIAL DECISION OF WALTER W. BRYAN,
EXAMINER IN THE NORTH AMERICAN AIRLINES, INC., CASE
DOCKET NOS. 5774 AND 5928

• This proceeding arises as the result of the Board's order serial No. E-7107, dated January 28, 1953, in which it is ordered that an investigation be instituted to determine whether North American Airlines, Inc., formerly Twentieth Century Air Lines, Inc., in engaging in air transportation under the name of North American Airlines, Inc., North American Airlines, or North American, has been and is engaging in activities and practices in violation of section 411 of the Act, and if any such violation is established, whether the Board should issue an order directing North American to cease and desist from such violations.

It is indicated in the record that on March 11, 1952, Twentieth Century Air Lines, Inc. (Twentieth Century) advised the Board that the corporate name of Twentieth Century had been changed to North American Airlines, Inc., (North American) effective March 3, 1952, and it requested the Board to change its records accordingly and reissue its letter of registration in the new name.

On August 19, 1952, the Board adopted an amendment No. 7 to Part 291 of its Economic Regulations, effective September 23, 1952. The above amendment added a new section, 291.28, *Business Name of Air Carrier*, which provided:

“On and after November 15, 1952, it shall be an express condition upon the operating authority granted

⁶ Support for this type of relief rather than that decided upon by the majority is found in several cases including *Singer Manufacturing Company v. Bent* 163 U. S. 205, and *French Republic v. Saratoga Vichy Company*, 191 U. S. 427.

by this Part and the letters of registration issued hereunder that the air carrier concerned, in holding out to the public and in performing air transportation services shall do so only in a name the use of which is authorized under the provisions of this section.

(a) Except as otherwise provided under paragraph (b) of this section, an air carrier may do business in the name in which its letter of registration is then issued and outstanding, including abbreviations, contractions, initial letters, or other minor variations of such name which are readily identifiable therewith:

(b) An air carrier may do business in such other and different name or names as the Board may by order permit, upon a finding that the use of such other name or names is not contrary to the public interest. Any such permission may be made conditional upon the abandonment of the use of the name in which its letter of registration is issued and outstanding, in air transportation service by the air carrier concerned, or
1061 otherwise be made subject to such reasonable terms and conditions as the Board may find necessary to protect the public interest."

On October 6, 1952, North American timely filed an application under the above regulation for authority to conduct its operations under the name North American Airlines, Inc., in lieu of Twentieth Century Air Lines, Inc. Upon consideration of this application the Board determined to institute the above described investigation and by its order consolidated the above application, Docket No. 5774, with the investigation proceeding, Docket No. 5928, for hearing and decision.

American Airlines, Inc., (American) was permitted to intervene and participated in the proceeding. A hearing has been held and all parties given an opportunity to file briefs with the Examiner.

Issues.—The issue involved here is whether North American has been or is engaged in unfair or deceptive practices, or unfair methods of competition in air transportation, within the meaning of section 411 of the Act, by the use

of the name North American Airlines, Inc., North American Airlines, or North American, and if any violation is established whether North American should be ordered to cease and desist therefrom; also whether the granting of the request in North American's application for leave to change its name to North American Airlines, Inc., would be contrary to the public interest.

Twentieth Century Airlines, Inc., was incorporated in North Carolina on May 4, 1946, and holds a letter of registration as a large irregular air carrier. On March 3, 1952, the above carrier amended its articles of incorporation so as to change its name to North American Airlines, Inc. Since on or about April 21, 1951, the above carrier has engaged in the air transportation of persons between, among other points, New York, Chicago, and Los Angeles, under the trade name of North American Airlines.

American Airlines, Inc., (American) the intervener in this proceeding, was incorporated in Delaware on April 11, 1934, succeeding American Airways, Inc., which was incorporated under the laws of Delaware on January 25, 1930. American has continuously engaged in air transportation of persons, property, and mail since the above dates and has operated between, among other places, New York, Chicago, and Los Angeles as a scheduled air carrier.

American registered on July 27, 1948, the name "American Airlines" under the Federal Trademark Act, 15 U.S.C. 1051 et seq., on the Principal Register (No. 514294) of the United States Patent Office as a service mark used in connection with the furnishing of air transportation.

1062 Since 1934 American has concentrated in its advertising [on] the names "American" and "American Airlines" with the purpose of creating in the public mind an identity between the name American and its air transportation service. There were introduced in evidence samples of such advertising as ["American's Leading Airline"], ["Better by Air—Best by American"], "American to Detroit the Most Frequent Service," "American to Washington \$98 via DC-6 Airtourist Service," "American to New York 11 Nonstop Flagships," and "American's Convairs Are Coming."

The above type of advertising has appeared weekly on 251 billboards and in 142 newspapers throughout the country with a combined circulation of approximately 28,000,000. American has spent in excess of \$2,250,000 for the above type of advertising since 1949.

American has also advertised extensively in magazines and during the period between 1948 and 1952 it spent approximately \$3,800,000 for such advertising. It also advertises in the various cities served by American by means of display signs appearing at airports and in other public places. In 1940 American produced a sales movie entitled "The American Way," which has been shown to groups throughout the country, depicting its service and the comfort, speed and convenience of air travel. American is currently spending on newspaper and billboard advertising approximately \$600,000 annually.

An officer of American in testifying stated that in his opinion the extensive advertising of American service as being the leading airline in American air commerce had been accepted by the traveling public. He further stated that much of American's advertising is devoted to identifying American with a certain route structure and with a certain type of superior equipment.

The direct evidence of record consists of testimony of witnesses who, for the most part, are employed by American as ticket and reservation agents located at Los Angeles, Burbank, Chicago, and New York. There were also affidavits and written statements from ticket and reservation agents received in evidence for the purpose of establishing whether the names "American" or "American Airlines" and "North American" or "North American Airlines" are confusing to the traveling public.

The above evidence generally involved numerous inquiries on the part of the public made to American employees concerning service, rates, routes, and schedules of North American under the mistaken impression that North American and American were one and the same airline.

An officer of American testified that he had received from employees under his supervision numerous inquiries indi-

cating confusion between American Airlines and
1063 North American Airlines, and that * * * his office had
received a telephone call from a representative of
a trade union, complaining that an American sign was
being painted by non-union painters, and upon investigation
it was found that the sign was that of North American.
There were instances of air passengers holding North
American tickets attempting to check in for North American
flights at American ticket counters—in fact, at the
Burbank office this was a daily occurrence—and many of
the passengers were still confused after an explanation
had been made that American and North American were
two different airlines. There were instances where North
American passengers attempted to claim their baggage at
the American counter; also other instances where prospec-
tive passengers insisted they were entitled to a discount for
transportation on American because they held a "Buyers
League Scrip Book." Upon an investigation by the pas-
sengers making the inquiries, it was learned that it was
North American instead of American which offered a dis-
count.

There were other instances of persons meeting incoming
North American passengers who made inquiries at the
American ticket counter at Burbank to determine time of
arrival. Other inquiries were made of American agents at
Los Angeles concerning an \$80 fare from Los Angeles to
New York, which the person had heard advertised on tele-
vision, and upon investigation it was found that it was
North American they were referring to and not American.
One witness testified that she had heard people state that
they were under the impression that North American and
American were the same or affiliated companies. Another
witness for American testified that one person insisted that
American flew from New York to Miami because she had
heard a radio program to that effect, whereas the program
in question was that of North American. There were in-
stances where mail addressed to North American was
delivered to American Airlines' office. Tradesmen have
dunned American for bills owed by North American and
hotels have requested American's advice as to billing for

hotel charges incurred by North American crews. A witness for American stated that at its Burbank office the president of North American, who is on duty at the North American ticket counter at Lockheed air terminal, informed her that many persons would stop at his counter and request tickets to Dallas, Oklahoma City, or Tulsa, points which North American did not serve, and he would realize that the passengers were confused and that they were under the impression it was American's ticket counter. The president further stated to the witness that if the passengers were destined to New York or Chicago he would do everything he could to "steal" them.

There were many other instances similar to those referred to above that need not be repeated here. In general, they indicate that certain confusion exists on the part of the public in distinguishing the services of the two airlines in question.

The witnesses who appeared and testified on behalf of North American were ticket agents from Burbank and Washington, D. C. Their testimony was to the effect that they had not experienced any great degree of confusion on the part of the public involving the similarity of names between American and North American. The agent at Burbank stated it was a common occurrence at his counter for persons to inquire about the services of other carriers such as United and particularly the services of North Star—in fact, the witness had noticed a certain amount of confusion existing on the part of the public between North American and North Star. Another witness for North American stated that his experience had been that the majority of customers made inquiries concerning destinations of the various carriers and were not particularly confused about the similarity of names of the carriers.

Discussion.—Section 411 of the Civil Aeronautics Act empowers the Board to determine whether any air carrier or ticket agent has been engaged or is engaging in unfair or deceptive practices, or unfair methods of competition in air transportation or the sale thereof, and if such is found to exist the Board is empowered to order discontinuance of such practices.

* * * one must look for guidance to the decisions of the courts in their application of unfair trade practices as set forth under section 5 of the Federal Trade Commission Act, * * * The Federal Trade Commission has been given the jurisdiction by statute over unfair competition in the common law sense of the term and also under the statutory language as defined "any unfair method of competition or unfair or deceptive act or practice in commerce." It is noted that the word "act" in the Federal Trade Commission Act has been omitted in section 411 of the Civil Aeronautics Act.

The courts have said that the unfair trade practice law is for the protection of the public and not for the experts, but rather for "the vast multitude which includes the ignorant, the unthinking, and the credulous, who in making purchases do not stop to analyze but are governed by appearance and general impressions."¹

The most common form of unfair competition is the imitation of a trade name, trade symbol, or device by a competitor. This may be a family name or the name of a corporation, labels, or deceptive packaging. * * *

1065 In the case of *Hudson Tire Co., Inc. v. Hudson Tire and Rubber Corporation et al.*, 276 F. 59, the court stated that the word "Hudson" as applied to tires had obtained a secondary meaning, referring to plaintiff's merchandise, and the fact that defendant had secured its corporate name from the State of New York did not authorize it to use the name "Hudson" in connection with such merchandise.

The courts have likewise held that in looking for a secondary meaning in a trade-mark, it is controlled by the fact that such a meaning has been acquired in the minds of the public rather than by the time it has taken for that fact to be established.⁴

Another case in point is that of *American Products Co. v. American Products Co.*, 42 F. 2d 488. It is noted that one

¹ See *Florence Mfg. Co. v. J. C. Dowd & Co.*, 178 F. 73; *Stork Restaurant, Inc. v. Sahati et al.*, 166 F. 2d 348.

⁴ *Barton et al. v. Rex-oil Co., Inc.*, 2 F. 2d 402.

of the above companies was a Delaware corporation and the other one a Michigan corporation. The court said, in part:

“Assuming, for the purposes of this opinion, that the name ‘American Products Company’ should be regarded as a geographical name indicating products made in America, rather than a somewhat fanciful name not intended to denote the place of manufacture of such products, it is well settled that when a person has adopted, as the name of a business, a term originally geographical, and, by his efforts and expenditures, has developed a reputation and good will for such business and its products, so that such name has come to mean, in the minds of the general public, that particular business and its products, such name thereby acquires a secondary meaning, as indicating such business, and its owner is entitled to protection, in its use, by a court of equity.”

In the case of *American Radio Stores, Inc. v. American Radio and Television Stores Corp.*, 150 A 180, the court stated:

“Those words (radio and stores) are purely descriptive and, when used by the complainant, have attached to them no meaning of a secondary nature. But when the word ‘American’ is used in conjunction with them, a distinguishing mark is introduced and the complainant is entitled to be protected in its use of that distinctive feature of its name.”

In the case of *Delaware L. & W. R. Co. v. Lackawanna Motor Freight Lines*, 175 Atl. 905, the court held that the rights of the plaintiff were based on a secondary meaning acquired by its use in the transportation business, and its use by defendant was a device to deceive the public, although the court held that fraudulent intent need not necessarily be shown to invoke the aid of the court.

1066 Another case in point is *American Thread Co. v. North American Thread Co., Inc.*, 33 F. Supp. 616, where the court held that a newcomer operating under a

similar name to a company already in the business was an act of unfair competition.

Another pertinent case is that of *Wamble v. Parker*, 67 S. E. 2d 133, which involved a newcomer into a business wherein it attempted to advertise its products under a trade name similar to one already in use by its long-established competitor. The court said, in part:⁵

“While geographical names and words which are merely descriptive are not generally the subject of exclusive appropriation as trade-marks or trade names, such names and words when used so long and exclusively by a trader, manufacturer or producer that they are generally understood to designate his business or merchandise, may acquire a secondary signification of meaning indicative not only of the place of manufacture, but of the name of the manufacturer or producer, or of the character of the product, so that the name or title thus employed, including the geographical name and descriptive words, may be the subject of protection against unfair competition in trade, and authorize equity to enjoin a newcomer competitor from the appropriation and use of a trade name or trade-mark bearing such resemblances to those of the pioneer as to be likely to produce uncertainty and confusion, and to pass off the goods or business of one as those of another.”

It is clear from the foregoing that a geographical term used in a business name may acquire a secondary meaning by actual use and upon which the owner may create goodwill in its business relationship with the public. Thus such name becomes a valuable asset and a business advantage. Therefore, in such instances the trade name becomes of a pecuniary value or a property right, and the courts have

⁵ Other cases in point are: *Phillips v. The Governor & Co. of Adventures of England trading into Hudson Bay*, 9 F. 2d 971; *Lincoln Motor Co. et al. v. Lincoln Automobile Co.*, 44 F. 2d 812; *Finchley, Inc. vs. Finchley Co., Inc.*, 40 F. 2d 736; *Western Auto Supply Co. v. Knox*, 93 F. 2d 850.

consistently held that such rights are entitled to the protection afforded by the courts.

There can be no dispute that American Airlines is the prior user of the name "American" as between it and North American, as American has used the above name since 1934 and its predecessor used the name prior to that time; whereas North American has used its name only since April 1951. American has consistently over the years promoted the use of the term "American" in its advertising and public relation work. * * *

1067 Upon consideration of all the facts, and in view of the court decisions pertaining thereto, it is concluded that the name "American" and "American Airlines" used in connection with air transportation has acquired a secondary meaning as identifying American Airlines, Inc.

* * *

One of the important factors in a case of this kind arising under section 411 is whether the public is being deceived or confused and thus affecting the public interest in air transportation. The court stated in the case of *Anheuser-Bush, Inc. v. Budweiser Malt Products Corporation*, 287 F. 243, that the fundamental question in cases of trade-marks or unfair competition is whether the public is being misled and deceived so that the defendant is in effect taking advantage of the good-will and business reputation of another who has built it up through service or advertising.⁸

There are numerous examples in the record indicating confusion between American and North American Airlines on the part of the public. * * *

The type of inquiries indicating confusion involved in this proceeding, which have heretofore been discussed, is typical of those occurring to the average member of the public. Naturally, such inquiries were not made by persons who are frequent travelers by air or well informed on aviation matters but rather the unformed, and it is the in-

⁸ See *United Drug Company v. Theodore Rectanus*, 248 U. S. 90.

terest of the uniformed that the Board is required to protect from confusion because of similarity of names.

* * * The courts have consistently held that in cases involving violation of trade-marks the right of injunction depends not on the fact that the purchaser has been deceived but rather on the fact that the public may be deceived if such acts of confusion are permitted to continue. The proof that confusion has already existed adds to the likelihood of continued deception.¹⁰

1068 There is no question but what American has acquired during the past 20 years through its constant efforts a good-will in its use of the name "American" or "American Airlines," which has become a valuable asset to be protected. However, an action for infringement of America's trade name can find its remedy in the courts. Section 411 was not designed for the purpose of protecting the private rights of an individual carrier except to the extent of a regulating competition between the various air carriers to assure fair competition and thereby maintain a sound economic transportation system; also, equally important, the Board was given the responsibility of safeguarding the public interest against unfair and deceptive methods of competition.

North American is a newcomer in the field of air transportation as compared to American's operations, and it should have known that the similarity of names between North American and American would have the capacity to confuse the public as to the true identity of the carriers. There are numerous instances of record where the public

¹⁰ *J. C. Penney Co. v. H. D. Lee Mercantile Co.*, 120 F. 2d 949; *Ralston Purina Co. v. Saniwax Paper Co. et al.*, 26 F. 2d 941; *Wisconsin Electric Co. v. Dumore Co.*, 35 F. 2d 555; *Henry Muhs Co. v. Farm Craft Foods, Inc., et al.*, 37 F. Supp. 1913; *United Drug Co. v. Obear-Nester Glass Co.*, 111 F. 2d 997; *Pep Boys—Manny, Moe & Jack, Inc. v. Federal Trade Commission*, 122 F. 2d 158. *American Home Benefit Assn., Inc. v. United American Benefit Assn., Inc.*, 125 F. 2d 1010; *United Lace & Braid Mfg. Co. v. Barthels Mfg. Co.*, 221 F. 456.

has been confused and inconvenienced by this similiarity of names. * * *

The task would not have been a difficult one for North American to have adopted another trade name which was different from the names of other air carriers in operation and thereby avoid the tendency on the part of the public to mistake one carrier for the other.

In view of the public confusion which has arisen and may increase in the future as air transportation becomes a more accepted mode of travel, and the services rendered by the carriers become more alike as well as the aircraft itself, it is in the public interest that the identity of the carrier be readily distinguishable by the public. Therefore, the continued use of the name "North American" by Twentieth Century is so similar to the trade name "American" as used by American Airlines, Inc., as to constitute an unfair and deceptive practice as well as an unfair method of competition, and it is so found.

1069

Order No. E-7870

UNITED STATES OF AMERICA

CIVIL AERONAUTICS BOARD

Washington, D. C.

Adopted by the Civil Aeronautics Board at its Office in Washington, D. C., on the 4th day of November, 1953

Docket No. 5774

In the Matter of the Application of NORTH AMERICAN AIRLINES, INC., for Authority to Conduct its Operations under the Name of North American Airlines, Inc.

Docket No. 5928

In the Matter of an Investigation Pursuant to Section 411 of the Act of Certain Practices of NORTH AMERICAN AIRLINES, INC.

ORDER

A full public hearing having been held in the above-entitled proceedings and the Board, upon consideration of

ALL AMERICAN AIRWAYS, INC.

EXECUTIVE OFFICES: WASHINGTON NATIONAL AIRPORT • WASHINGTON 1, D. C.

ROBERT M. LOVE, President
HALSEY R. BRAZLEY, Vice President

CHARLES W. WENDT, Vice President-Treasurer

DAVID L. MILLER, Director of Sales
COLIN H. MCINTOSH, Director of Operations

OPERATING ROUTE 97—PASSENGERS—MAIL—CARGO

WASHINGTON—BALTIMORE—PITTSBURGH

105	103	101	Effective March 7, 1949		100	102	104
Daily	Ex Su & Hol.	Daily	Read Down	Read Up	Daily	Ex Su & Hol.	Daily
PM	PM	AM	Lv	Ar	AM	PM	PM
1 40	2 00	7 00	Lv WASHINGTON	(EST) Ar	10 44	1 11	8 04
6 02		7 22	Ar BALTIMORE	Lv	10 21		7 41
5 04		7 24	Lv BALTIMORE	Ar	10 19		7 39
5 29	2 27	7 49	Ar FREDERICK	Lv	9 56	12 46	7 16
5 31	2 29	7 51	Lv HAGERSTOWN	Ar	9 54	12 44	7 14
5 49	2 47	8 09	Ar HAGERSTOWN	Lv	9 37	12 27	6 57
5 51	2 49	8 11	Lv HAGERSTOWN	Ar	9 35	12 25	6 55
6 07	3 05	8 27	Ar MARTINSBURG	Lv	9 19	12 09	6 39
6 16	3 14	8 36	Lv MARTINSBURG	Ar	9 10	12 00	6 30
6 40	3 38	9 00	Ar CUMBERLAND	Lv	8 48	11 38	6 08
6 42	3 40	9 02	Lv CUMBERLAND	Ar	8 46	11 36	6 06
7 09	4 07	9 29	Ar CONNELLSVILLE-UNIONTOWN	Lv	8 21	11 11	5 41
7 11	4 09	9 31	Lv CONNELLSVILLE-UNIONTOWN	Ar	8 19	11 09	5 39
7 32	4 30	9 52	Ar PITTSBURGH	(EST) Lv	8 00	10 50	5 20
PM	PM	AM			AM	AM	PM

DC-3 Equipment on all flights.

ATLANTIC CITY—PHILADELPHIA—PITTSBURGH

204A	202A-305	200A-303	301	Effective March 7, 1949		300-201A	302-203A	304-205A
PM	PM	PM	AM	Read Down	Read Up	AM	PM	PM
10 23	3 19	12 49	Lv ATLANTIC CITY	(EST) Ar	11 39	2 39	8 59	
10 49	3 45	1 15	Ar PHILADELPHIA-CAMDEN	Lv	11 15	2 15	8 35	
	4 15	1 45	Lv PHILADELPHIA-CAMDEN	Ar	10 43	1 43	8 03	
	4 41	2 01	Lv WILMINGTON	Ar	10 27	1 27	7 47	
	4 50	2 10	Lv WILMINGTON	Ar	10 18	1 18	7 38	
	5 06	2 35	Ar LANCASTER	Lv	9 54	12 54	7 14	
	5 08	2 37	Lv LANCASTER	Ar	9 52	12 52	7 12	
	5 27	2 57	Ar HARRISBURG	Lv	9 34	12 34	6 54	
	5 29	2 59	Lv HARRISBURG	Ar	9 32	12 32	6 52	
	6 05	3 35	Ar ALTOONA	Lv	8 58	11 58	6 18	
	6 07	3 37	Lv ALTOONA	Ar	8 56	11 56	6 16	
	6 24	3 54	Ar JOHNSTOWN	Lv	8 40	11 40	6 00	
	6 26	3 56	Lv JOHNSTOWN	Ar	8 38	11 38	5 58	
	6 56	4 26	Ar PITTSBURGH	(EST) Lv	8 10	11 10	5 30	
PM	PM	PM	AM			AM	AM	PM

DC-3 Equipment on all flights.

NOW

A NEW PASSENGER SERVICE COVERING
THE HEART OF INDUSTRIAL AMERICA

Replacing its air pick-up operations with conventional passenger, mail and cargo service, All American Airways will open two segments of its newly certificated routes this month. Equipment used is twin-engined DC-3's, with built-in

steps to cut ground time down to two minutes at each local stop. Specify All American for fast flights to these new airline points and for quick interline connections.

ALL

BUFFALO

6 07	3 05	8 27	Ar MARTINSBURG	Lv	9 19	12 09	6 39
6 16	3 14	8 36	Lv MARTINSBURG	Ar	9 10	12 00	6 30
6 40	3 38	9 00	Ar CUMBERLAND	Lv	8 48	11 38	6 08
6 42	3 40	9 02	Lv CUMBERLAND	Ar	8 46	11 36	6 06
7 09	4 07	9 29	Ar CONNELLSVILLE-UNIONTOWN	Lv	8 21	11 11	5 41
7 11	4 09	9 31	Lv CONNELLSVILLE-UNIONTOWN	Ar	8 19	11 09	5 39
7 32	4 30	9 52	Ar PITTSBURGH	(EST) Lv	8 00	10 50	5 20
PM	PM	AM			AM	AM	PM

DC-3 Equipment on all flights.

5 08	2 37	8 08	Lv LANCASTER	Ar	9 52	12 52	7 12
5 27	2 57	8 27	Ar HARRISBURG	Lv	9 34	12 34	6 54
5 29	2 59	8 29	Lv HARRISBURG	Ar	9 32	12 32	6 52
6 05	3 35	9 05	Ar ALTOONA	Lv	8 58	11 58	6 18
6 07	3 37	9 07	Lv ALTOONA	Ar	8 56	11 56	6 16
6 24	3 54	9 24	Ar JOHNSTOWN	Lv	8 40	11 40	6 00
6 26	3 56	9 26	Lv JOHNSTOWN	Ar	8 38	11 38	5 58
6 56	4 26	9 56	Ar PITTSBURGH	(EST) Lv	8 10	11 10	5 30
PM	PM	PM	AM		AM	AM	PM

DC-3 Equipment on all flights.

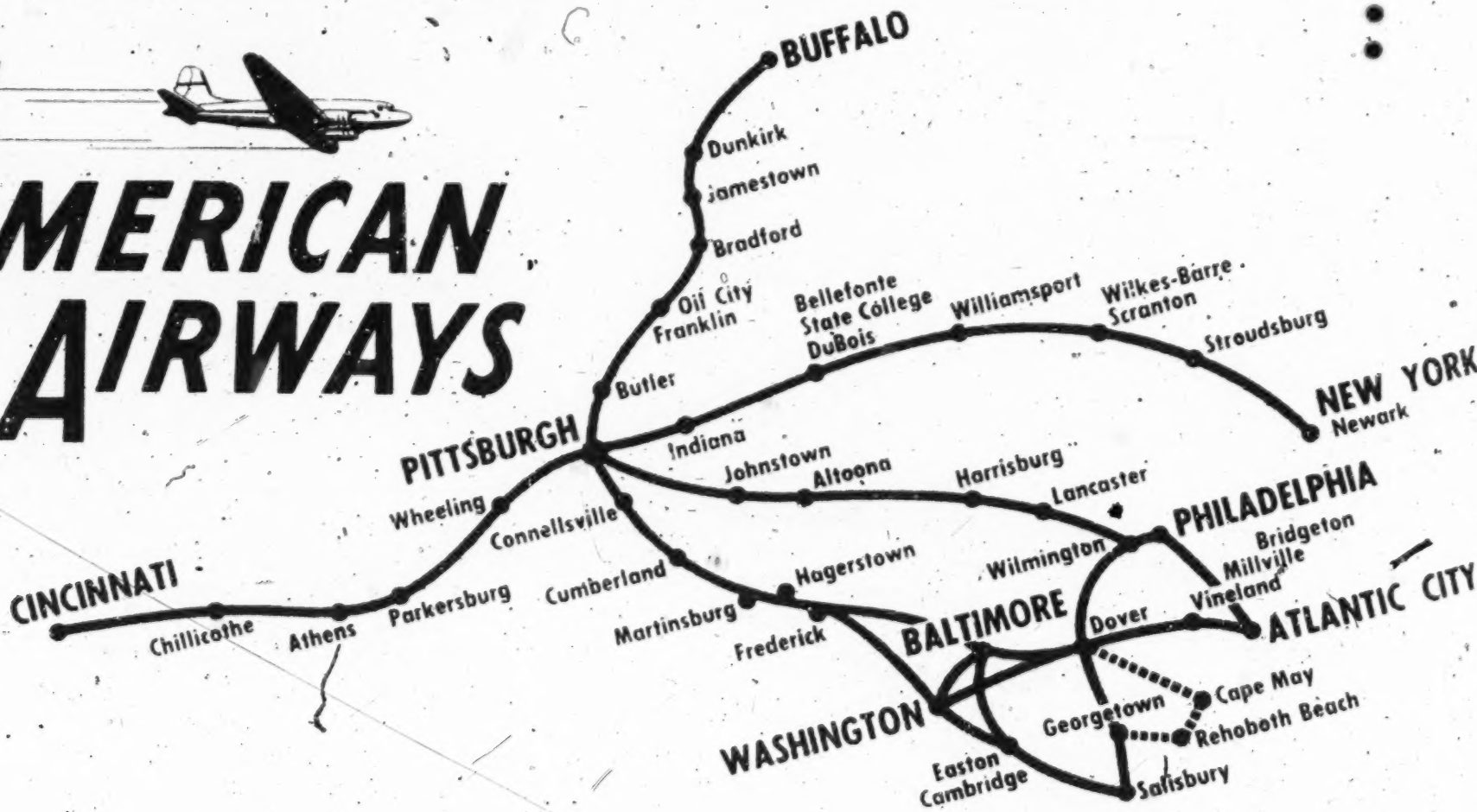
NOW

A NEW PASSENGER SERVICE COVERING
THE HEART OF INDUSTRIAL AMERICA

Replacing its air pick-up operations with conventional passenger, mail and cargo service, All American Airways will open two segments of its newly certificated routes this month. Equipment used is twin-engined DC-3's, with built-in

steps to cut ground time down to two minutes at each local stop. Specify All American for fast flights to these new airline points and for quick interline connections.

ALL AMERICAN AIRWAYS



the record, having issued its opinion containing its findings, conclusions and decision, which is attached hereto and made a part hereof;

It is ordered:

1. That the application of North American Airlines, Inc., for authority to engage in air transportation under the name North American Airlines, Inc., be and it hereby is denied;

2. That on and after the 90th day after the date of adoption of this order, North American Airlines, Inc., and its successors, assignees, representatives, agents, officers and employees be and hereby are ordered to cease and desist from engaging in air transportation under the names North American Airlines, Inc., North American Airlines, North American, or any other name which includes the word American.

By the Civil Aeronautics Board:

(S.) M. C. MULLIGAN,

[SEAL.]

Secretary.

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Pages 231 to 294

(Incomplete)

Note

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supplementary cards will be shot.

1173

Regulations
Serial Number ER-178

UNITED STATES OF AMERICA

CIVIL AERONAUTICS BOARD
Washington, D. C.Economic Regulations
Amendment No. 7 to Part 291
Effective: September 23, 1952
Adopted: August 19, 1952

BUSINESS NAME OF AIR CARRIER

At the present time the Economic Regulations of the Board do not attempt to regulate the names under which air carriers do business. While a change in name by the holder of a certificate of public convenience and necessity has always been regarded by the Board as requiring an amendment to such certificate, there is no express requirement that the carrier do business under the exact name in which its economic operating authority is issued. The Board possesses the power, pursuant to section 411 of the Civil Aeronautics Act to require a carrier, after notice and hearing, to cease and desist from the use of a given name in cases where it finds that such use by the carrier concerned amounts to an unfair or deceptive practice or an unfair method of competition.

Until the relatively recent past there has been no need to make specific provision relating to the use of business names by air carriers since most carriers were in fact doing business under their official name without any compulsion to do so. However, there has been an increasing tendency, particularly among some of the large irregular carriers, to use names different from those in which operating authority is granted by the Board, in some cases the name being used having no identifiable relation to the name in which the authority is held. This has resulted in confusion in the minds of the public, an increase in the administrative burden of the Board, and greater difficulty in achieving adequate enforcement of the Act and the regulations. The

Board has received an increasingly large number of complaints from the public indicating that the complainant did not know the true identity of the carrier against which the complaint was being made. In several instances, it has been necessary to undertake considerable correspondence and even field investigations in order to identify the carrier responsible. Aircraft accidents have been reported in the press as having involved air carriers bearing names not registered with or even known to the Board. In at least one instance, a trade name of a carrier whose operating authority had been revoked for willful violation of the Act was assumed by another carrier operated by the same management personnel as that of the carrier whose authority had been revoked.

Most important the foregoing practices, combined with equally unstable identities among ticket agencies, have made it difficult, and in many instances impossible, for members of the traveling public to know the identity with whom they are doing business. This has had serious consequences both with respect to the business relationships involved and with respect to liability for injury or death of a passenger or other members of the public, or the loss of or damage to property.

The possibility of such abuse exists for every type of air carrier, irrespective of how its operations are authorized; and, even though the number of abuses has been relatively small, the Board believes that it should not take action to enable it to deal effectively with such abuses and to prevent their occurrence. For this reason it is adopting this regulation together with companion amendments to Parts 202, 203, 292, 296, 297 and 298 of the Economic Regulations. In so doing it is the intention of the Board to permit the greatest managerial discretion possible in the use of business names consistent with the objective of the regulation. Accordingly, the regulation permits use of abbreviations, initials, nicknames and other variations of the name on file with the Board without obtaining permission therefor and places no restrictions on the use of slogans. Moreover, in cases where the circumstances warrant such action, the Board may permit the use of two or more differ-

ent names by one carrier upon a showing that such multiple use will not be contrary to the public interest. Permission granted under this Part will not effect a formal change in name, but will merely constitute authority to use a different name.

It should also be noted that the restriction on the use of names does not become effective until 60 days after the effective date of the regulation. This 60-day period is designed to enable carriers which have developed goodwill in a name different from that in which their operating authority is held, to apply for and obtain permission to use such other name either exclusively or in conjunction with its certificated name. In cases where goodwill has been established in a name by use thereof, the Board will deny permission to continue such name only in cases where it believes that a violation of section 411 may be involved and such fact has been established after notice and opportunity for a hearing.

Interested persons have been afforded an opportunity to participate in the making of this rule and due consideration has been given to all relevant matter presented.

In consideration of the foregoing, the Civil Aeronautics Board hereby amends Part 291 of the Economic Regulations (14 CFR 291) effective September 23, 1952, by adding thereto a new section 291.28 to read as follows:

291.28 *Business Name of Air Carrier.* On and after November 15, 1952 it shall be an express condition upon the operating authority granted by this Part and the letters of registration issued hereunder that the air carrier concerned, in holding out to the public and in performing air transportation services shall do so only in a name the use of which is authorized under the provisions of this section.

1175 (a) Except as otherwise provided under paragraph (b) of this section, an air carrier may do business in the name in which its letter of registration is then issued and outstanding, including abbreviations, contractions, initial letters, or other minor variations of such name which are readily identifiable therewith.

(b) An air carrier may do business in such other and dif-

ferent name or names as the Board may by order permit, upon a finding that the use of such other name or names is not contrary to the public interest. Any such permission may be made conditional upon the abandonment of the use of the name in which its letter of registration is issued and outstanding, in air transportation service by the air carrier concerned, or otherwise be made subject to such reasonable terms and conditions as the Board may find necessary to protect the public interest.

(c) Slogans shall not be considered names for the purposes of this section, and their use is not restricted hereby.

(d) Neither the provisions of this section nor the grant of a permission hereunder shall be deemed to constitute a finding for purposes other than for this section, or to effect a waiver of, or exemption from, any provisions of the Civil Aeronautics Act, or any orders, rules, or regulations issued thereunder.

(Section 205(a), 52 Stat. 984, 49 U. S. C. 425. Interpret or apply sections 411, 416(a), 416(b); 66 Stat. 628, 52 Stat. 1004; 49 U. S. C. 491, 496.)

By the Civil Aeronautics Board:

[SEAL.]

(S.) M. C. MULLIGAN,
Secretary.

Part 291 last printed June 1, 1950.

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Official Airline Guide

STANDARD REFERENCE OF THE AIR TRAFFIC CONFERENCE OF AMERICA

AN AMERICAN AVIATION PUBLICATION

RECURRENT REPORT OF MILEAGE AND TRAFFIC DATA

RECURRENT REPORT OF MILEAGE AND TRAFFIC DATA

AMERICAN				UNITED				TWA				EASTERN				AMERICAN				UNITED				TWA				EASTERN			
SCHEDULED OPERATIONS ONLY																															
12 Months				12 Months				12 Months				12 Months				12 Months				12 Months				12 Months				12 Months			
This Year				Last Year				This Year				Last Year				This Year				Last Year				This Year				Last Year			
AIRCRAFT MILES:																															
Pass., prop. and U. S. mail - reg. trips....				68,256,171				54,322,698				53,222,355				189,340,697				46,412,606				13,404,094				53,277,653			
Pass., prop. and U. S. mail - ex. sections....				642,132				497,288				497,288				497,288				497,288				497,288				497,288			
Property and U. S. mail only - reg. trips....				2,734,897				3,062,576				2,840,725				3,950,546				2,840,725				2,840,725				2,840,725			
Property and U. S. mail only - ex. sections....				132,394				432,063				432,063				432,063				432,063				432,063				432,063			
Passenger and property only.....				1,726,157				697,666				697,666				697,666				697,666				697,666				697,666			
Property only.....				25,834				None				None				None				None				None				None			
Nontransport.....				None				None				None				None				None				None				None			
Total revenue miles flown.....				74,595,115				58,108,773				57,667,157				53,241,983				49,531,606				15,810,069				56,074,900			
Nonrevenue miles.....				1,557,656				853,722				2,154,272				946,916				1,397,449				1,220,253				1,182,397			
Total miles flown.....				76,152,771				58,962,495				59,821,429				54,188,899				50,929,054				17,030,322				57,257,297			
PASSENGER TRAFFIC:																															
Number of revenue passengers carried.....				1,843,813				3,477,374				2,820,523				2,462,466				2,072,680				1,569,372				3,438,965			
Revenue passenger-miles (000).....				2,467,833				1,739,523				1,730,950				1,411,737				1,512,497				1,106,196				1,548,548			
Nonrevenue passenger-miles (000).....				93,977				24,880				24,880				24,880				24,880				24,880				24,880			
Total passenger-miles (000).....				2,561,810				1,764,403				1,755,830				1,436,617				1,537,377				1,131,076				1,573,428			
Available seat-miles operated (000).....				3,302,093				2,467,762				2,298,758				2,039,475				1,685,013				1,605,013				1,585,867			
Revenue passenger-load factor.....				74.74				69.64				72.30				68.25				76.15				66.45				64.30			
TON-MILES (ON REVENUE FLIGHTS):																															
Passenger (including free baggage).....				234,911,109				166,272,752				164,440,317				134,111,828				143,678,744				105,988,647				156,306,387			
U. S. mail - letter.....				15,304,017				10,098,259				18,196,968				12,439,582				11,917,363				9,120,325				5,693,843			
U. S. mail - parcel post.....				None				None				None				None				None				None				None			
Foreign mail.....				8,923,227				7,481,535				9,681,925				9,213,794				7,509,904				6,421,636				4,876,136			
Express.....				35,184,319				27,774,546				22,176,529				13,685,401				14,960,784				13,685,401				5,369,175			
Freight.....				2,457,061				2,037,731				1,362,685				1,251,548				1,213,159				1,093,132				2,040,497			
Excess baggage.....				297,087,733				221,027,354				216,079,424				184,794,898				179,279,934				175,469,211				174,788,306			
Total revenue ton-miles.....				12,012,213				8,333,177				10,400,552				3,579,393				12,012,213				10,400,552				3,579,393			
Nonrevenue.....				309,099,916				331,107,979				342,929,684				331,107,979				342,929,684				331,107,979				342,929,684			
Total revenue and nonrevenue ton-miles.....				311,112,129				339,441,156				353,330,236				334,687,871				355,038,898				341,516,531				346,517,675			
Available.....				68.8				68.75				63.01				58.75				67.03				52.82							
PERFORMANCE FACTOR:																															
Scheduled miles.....				75,298,623				59,139,807				59,934,612				52,921,243				52,278,608				46,481,975				54,609,371			
Scheduled miles flown.....				73,595,997				56,714,835				56,772,086				51,858,059				48,978,888				45,109,468				53,899,347			
Percentage completed.....				97.74				95.90				94.72				97.99				93.69				97.05				94.48			
USE OF AIRCRAFT:																															
Number of aircraft days assigned.....				19,818				16,825				13,462				15,469				10,213				36,290				31,611			
Avg. rev. hrs. of use per day per aircraft..				6.56				5.50				6.18				5.54				6.24				6.17				5.49			
WEIGHTED AVG. ROUTE MILEAGE OPERATED				6,512				6,521				7,079				7,085				5,085				5,226				6,091			
UNREVENUE OPERATIONS																															
Revenue Miles Flown				86,941				167,509				685,475				434,824				242,926				432,138				92,180			
Total Miles Flown				86,941				167,509				685,475				434,824				242,926				432,138				92,180			
Revenue Ton-Miles				394,537				788,968				3,219,306				1,515,822				932,375				1,257,514				373,433			
Available Ton-Miles				569,538				1,162,737				4,322,125				2,085,441				1,662,842				2,085,441				668,776			
MILES FLOWN BY NONREVENUE TYPES OF AIRCRAFT				147,762				149,206				293,680				AIRCRAFT				147,762				149,206				293,680			

1179. IN THE UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

Civil Action No. 12041

NORTH AMERICAN AIRLINES, INC., Petitioner,

v.

CIVIL AERONAUTICS BOARD, Respondent

MOTION FOR LEAVE TO INTERVENE

American Airlines, Inc. (hereinafter sometimes referred to as "American") moves this Court pursuant to Rule 38(f) of the General Rules of the United States Court of Appeals for leave to intervene and become a party to the above-entitled proceeding. In support thereof, American Airlines, Inc., alleges as follows:

1. American Airlines, Inc. is a corporation organized under the laws of the State of Delaware and is the holder of certificates of public convenience and necessity from the Civil Aeronautics Board authorizing it to engage in air transportation with respect to persons, property and mail for Routes Nos. 4, 7, 25, 56 and FAM 26. Pursuant to these certificates, American engages in air transportation services between, among other points, New York, Chicago and Los Angeles. Petitioner in the above-entitled proceeding also engages in air transportation services between, among other points, New York, Chicago and Los Angeles.

1180 2. American Airlines, Inc. has operated under that name as a scheduled air carrier since 1934 and as an air carrier certificated under the Civil Aeronautics Act of 1938 since the completion of grandfather certificate proceedings. During that time, American has expended substantial sums of money, as well as time and effort, in establishing its name and reputation, and has created substantial goodwill attaching to the name "American Airlines, Inc." and such derivatives as "American" and "American Airlines."

3. By its application in Docket No. 5774 before the Civil Aeronautics Board, petitioner, an irregular air carrier

holding a letter of registration from the Civil Aeronautics Board under its then formal name, Twentieth Century Airlines, Inc., sought authority to use the name "North American Airlines, Inc." and variations thereof such as "North American Airlines" and "North American." American Airlines, on October 17, 1952, filed a memorandum in opposition to this application of Twentieth Century. In its memorandum American pointed out, among other things, that Twentieth Century's use of the "North American" name constituted an unfair competitive practice in violation of Section 411 of the Civil Aeronautics Act. At the same time American filed its petition to intervene in the matter of the Twentieth Century application Docket No. 5774.

4. By its order Serial No. E-7107, January 28, 1953, the Civil Aeronautics Board instituted as Docket No. 5928 an investigation to determine whether Twentieth Century Airlines, Inc., in using the name "North American Airlines," was engaging in activities and practices in violation of Section 411 of the Act. This investigation, Docket No. 5928, was consolidated with the Twentieth Century application, Docket No. 5774.

5. By its order Serial No. E-7174, February 19, 1953, the Civil Aeronautics Board permitted American to intervene in the said consolidated proceedings. In these proceedings, American maintained that the name "North American" constituted an infringement on the name "American" and amounted to an unfair method of competition against which American was entitled to protection under Section 411 of the Act; that use of the name "North American Airlines" engendered confusion, tended to create the impression that the carrier was operated by or affiliated with American, amounted to an appropriation of American's reputation and goodwill, and removed that reputation from the power of American to protect; and that the Civil Aeronautics Board should deny Twentieth Century's request for authority to use the name "North American Airlines", and order Twentieth Century to cease and desist from doing business under the name "North American Airlines" and variations thereof.

6. By its order Serial No. E-7870, November 4, 1953, the Civil Aeronautics Board denied petitioner's application under Docket No. 5774 and ordered petitioner to cease and desist from engaging in air transportation under the name "North American Airlines, Inc.," "North American Airlines," "North American" or any combination of the word "American". By its terms the said cease and desist order will become effective 90 days from the date of issuance.

7. North American Airlines, Inc. (previously 1182 Twentieth Century Airlines, Inc.) has petitioned this Court to review the said order of the Civil Aeronautics Board in Dockets Nos. 5774 and 5928.

8. American has a substantial property and financial interest in the subject matter of this proceeding. American's interest will be affected by the orders entered in the proceeding, and will not be adequately represented by any other party.

WHEREFORE, American Airlines, Inc., prays that it be permitted to intervene and become a party to these proceedings.

Respectfully submitted,

(Signed) HOWARD C. WESTWOOD,

JOHN W. DOUGLAS,

JEROME ACKERMAN,

701 Union Trust Building,

Washington 5, D. C.,

Attorneys for

American Airlines, Inc.

January 13, 1954.

COVINGTON & BURLING,

Of Counsel.

1183 UNITED STATES COURT OF APPEALS FOR THE DISTRICT
OF COLUMBIA CIRCUIT

No. 12,041

NORTH AMERICAN AIRLINES, INC., Petitioner

v.

CIVIL AERONAUTICS BOARD, Respondent

AMERICAN AIRLINES, INC., Intervenor

Before

ORDER

On consideration of the matters transpiring at the pre-hearing conference held herein on February 4, 1954 and February 8, 1954 under Rule 38(k) of the Rules of this Court, and of the annexed stipulation between the parties which defines and limits the issues, stipulates certain facts, and establishes procedures and dates for the filing of briefs and the joint appendix to briefs, it is

Ordered that such stipulation be, and it hereby is, approved and shall control the subsequent course of this case unless hereafter modified by the Court.

Per CURIAM.

Dated: _____

1184 IN THE UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 12,041

NORTH AMERICAN AIRLINES, INC., Petitioner,

v.

CIVIL AERONAUTICS BOARD, Respondent,

AMERICAN AIRLINES, INC., Intervenor

PREHEARING CONFERENCE STIPULATION

After prehearing conferences pursuant to Rule 38(k) of the Rules of Court, the parties, subject to the approval of

the Court, hereby stipulate and agree as follows with respect to the issues, certain factual matters, and the procedure and dates for the filing of the briefs and joint appendix to briefs herein:

I

Issues

In the order under review (E-7870), the Civil Aeronautics Board determined "that the use by [petitioner] of the name North American Airlines, Inc., North American Airlines, North American, or any combination of the word American constitutes an unfair or deceptive practice and unfair method of competition within the meaning of Section 411" of the Civil Aeronautics Act (49 U. S. C. 491), and ordered petitioner to cease and desist from engaging in air transportation under any of these names or any name containing the word "American." Subject to the right of any

1185 party to take the position that any matter hereinafter set forth is surplusage and unnecessary to the Board's determination, or that any issue hereinafter set forth does not present a substantial question, the issues are agreed to be limited to the following:

(1) Whether the findings contained in the Board's report and Order E-7870, or any combination of them, establish a violation of Section 411, because of the use by petitioner of the name North American Airlines, Inc., North American Airlines or North American; and

(2) Whether the findings contained in the Board's report and Order E-7870 establish a secondary meaning connoting American Airlines, Inc., in the words "American" and "American Airlines;" and

(3) Whether the respondent Civil Aeronautics Board has made a finding that petitioner's use of the name North American Airlines, Inc., or of the word "American" in its name was fraudulent; and

(4) Whether the findings set forth in report and Order E-7870, hereinafter enumerated in substance, are supported by substantial evidence:

(a) That there is a confusing similarity between petitioner's corporate name and the name American Airlines, Inc.;

(b) That because of such similarity public confusion is probable;

(c) That such public confusion is likely to continue;

(d) That the terms "American" and "American Airlines" had acquired a secondary meaning in air transportation by virtue of prior usage by American Airlines, Inc., before petitioner adopted its trade name or changed its corporate name, and that such secondary meaning continues to exist;

1186 (e) That substantial public confusion has existed in the past, and is likely to continue, either because of the secondary meaning found to exist with respect to the words "American" and "American Airlines" or because of the similarity of the corporate names of petitioner and American Airlines, Inc., or both;

(f) That petitioner's use of a name containing the word "American" was fraudulent (assuming that the Board made such a finding);

(g) That petitioner's use of a name confusingly similar to that of American Airlines, Inc., was not accidental or inadvertent, but rather was knowing.

II

Facts Stipulated

1. That American Airlines, Inc., and petitioner are in competition in air transportation.

2. That American Airlines, Inc., was incorporated in Delaware on April 11, 1934, succeeding American Airways, Inc., which was incorporated in Delaware on January 25, 1930, and that the company has engaged continuously in the air transportation of persons, property and mail since the mentioned dates.

3. That petitioner was incorporated in North Carolina on May 4, 1946 as Twentieth Century Airlines, Inc., and holds a Letter of Registration as a Large Irregular Carrier issued in that name by the Civil Aeronautics Board. That peti-

tioner since April 21, 1951 has engaged in the air transportation of persons and property under the trade names of North American Airlines, Inc., North American Airlines, and North American, and that on March 3, 1952, it amended its articles of incorporation so as to change its name to North American Airlines, Inc.

1187

III

Limitation as to Use of Certain Evidence

Evidence going to the question of confusion relied on by the Board is limited in accordance with the last full paragraph of Point 1 of the Board's opinion appearing on Tr. 1039.

IV

Petitioner takes the position that the admissibility of evidence is in issue. Respondent and Intervenor take the position that Petitioner cannot raise any question of admissibility of evidence.

V

Procedure With Respect to Filing of Briefs and Joint Appendix to Briefs

For the purpose of eliminating needless printing and facilitating the work of the Court, the parties agree that the joint appendix to briefs will be printed and filed only after all briefs have been prepared and filed with the Court in accordance with the procedures hereinafter set forth.

In preparing and printing briefs, all record references shall be to the pages of the original transcript of record on file with the Court, and shall be designated as "Tr." The joint appendix shall be printed with the page numbers of the record as certified to this Court appearing at the place where each new record page begins on the printed page of the joint appendix, and running heads showing the record pages appearing thereon shall be printed at the outer top corner of each page of the printed joint appendix. The usual numerical pagination of the printed joint appendix will appear in the center of the page.

Petitioner will serve either page proof or final print of its brief upon respondent and intervenor on or before February 25, 1954, together with a precise designation of those portions of the transcript pages upon which it relies and which it wishes to have printed in the joint appendix. Respondent and intervenor will serve page proof or final print of their briefs on petitioner on or before March 17, 1954, together with precise designations of the portions of the transcript upon which they rely and which they desire to have included in the joint appendix. Petitioner will serve page proof or final print of its reply brief upon respondent and intervenor on or before March 27, 1954, together with a precise designation of any additional portions of the transcript upon which it relies and which it wishes to print. Printed copies of each such brief shall be filed with the Court not later than five days after the date hereinbefore specified for service upon the parties.

Immediately after March 27, 1954, petitioner shall cause to be printed and filed as promptly as possible the joint appendix to briefs. Such joint appendix shall contain the materials designated by the parties as heretofore provided, and in addition shall contain the following:

1. This stipulation and the order of the Court approving the stipulation.
2. Board Order E-7107 instituting investigation.
3. Board report and Order E-7870.
4. Motion for leave to intervene herein filed by American Airlines, Inc., and the order of the Court granting such motion (cost of printing of this item to be paid by American).

It is further agreed and stipulated, except insofar as modified by Paragraph III above, that any party and the Court, at and following the hearing in the case, may refer to any portion of the original transcript of record herein which has not been printed to the same extent and effect as if such portions of the transcript had been printed, it being understood that any portions of the record thus referred to will be printed in a supplemental

joint appendix if the Court at the time of argument directs same to be printed.

(Sgd.) HARDY K. MACLAY,
Attorney for Petitioner.

(Sgd.) JOHN H. WANNER,
Attorney for Respondent.

(Sgd.) HOWARD C. WESTWOOD,
Attorney for Intervenor.

1190²⁰ UNITED STATES COURT OF APPEALS FOR THE DISTRICT
OF COLUMBIA CIRCUIT, JANUARY TERM, 1954

No. 12,041

NORTH AMERICAN AIRLINES, INC., Petitioner,

v.

CIVIL AERONAUTICS BOARD, Respondent

Before Stephens, Chief Judge, and Edgerton and Wash-
ington, Circuit Judges, in Chambers

ORDER

Upon consideration of the motion of American Airlines, Inc., for leave to intervene and become a party in the above entitled case, and it appearing that no opposition to said motion has been filed, it is

Ordered by the Court that the aforesaid motion be, and it is hereby, granted.

Dated: January 28, 1954.

Per CURIAM.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion for Leave to Intervene was served this date upon North American Airlines, Inc., by mailing copies thereof, postage prepaid, to its counsel of record, Hardy K. Maclay and Walter D. Hansen, 1317 F Street, N. W., Washington, D. C., and upon the Civil Aeronautics Board by mailing copies thereof, postage prepaid, to its General Counsel, Emory T. Nunneley, Civil Aeronautics Board, Commerce Department, Washington, D. C.

JEROME ACKERMAN.

January 14, 1954.

Pages 313 through 410 omitted in printing

411

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12041

NORTH AMERICAN AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT
AMERICAN AIRLINES, INC., INTERVENOR

On Petition for Review of Order of the
Civil Aeronautics Board

Decided June 23, 1955

Mr. Hardy K. Maclay, with whom *Mr. Walter D. Hansen* was on the brief, for petitioner.

Mr. Gerald F. Krassa, Attorney, Civil Aeronautics Board, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of Court, with whom *Messrs. Emory T. Nunneley, Jr.*, General Counsel, Civil Aeronautics Board, *John H. Wanner*, Associate General Counsel, Civil Aeronautics Board, and *James L. Highsaw, Jr.*, Chief, Litigation and Research Division, Civil Aeronautics Board, were on the brief, for respondent. *Messrs. O. D. Ozment*, Attorney, Civil Aeronautics Board, and *Charles H. Weston*, Attorney, Department of Justice, also entered appearances for respondent.

Mr. Howard C. Westwood, with whom *Messrs. John W. Douglas* and *Jerome Ackerman* were on the brief, for intervenor.

Before *PRETTYMAN*, *FAHY* and *DANAHER*, Circuit Judges.

DANAHER, *Circuit Judge*: Petitioner asks review of a Board order which denied petitioner's application for authority to engage in air transportation under the name North American Airlines, Inc., and which further ordered the petitioner, "its successors, assignees, representatives, agents, officers and employees . . . to cease and desist from engaging in air transportation under the names North American Airlines, Inc., North American Airlines, North American, or any combination of the word 'American.' "

Petitioner, holder of Letter of Registration No. 528 issued to Twentieth Century Airlines, Inc., July 22, 1947, is an irregular air carrier engaged in air transportation primarily between New York, Chicago, Kansas City and Los Angeles. About May 21, 1951, petitioner commenced operations under the trade names of North American Airlines and North American, and on March 3, 1952, petitioner changed its corporate name to North American Airlines, Inc. By letter dated March 11, 1952, petitioner advised the Board of its change of name and sought reissue of its Letter of Registration accordingly. Without then acting upon petitioner's application, the Board on August 19, 1952 amended its regulations to provide that on and after November 15, 1952 an irregular carrier might hold out to the public and perform air transportation services only in the name appearing in its Letter of Registration.

The Board's introductory comment to its new Economic Regulations, § 291.28 pointed out that where good will had been established in a name by use thereof, the Board would deny permission to continue such name only in cases where it believed that a violation of § 411 of the Act¹ might be involved and where such fact had been

¹ 49 U.S.C. § 491 (1952), which reads in part as follows:

"The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket

established after notice and opportunity for a hearing. On October 6, 1952 petitioner, pursuant to the new regulation, applied to the Board for authorization to conduct its operations under its corporate name rather than as Twentieth Century Airlines, Inc. In support of its application, petitioner set out that it had invested "substantial" sums of money in the name North American Airlines and had established "substantial" good will in that name at a time when there was no Board regulation of the names of air carriers.

American Airlines, Inc., was allowed to intervene in opposition to petitioner's application, representing, principally, that the name "North American" infringed upon the established name of American and constituted unfair competition within the meaning of § 411 of the Act, and further urging that North American had no vested right or established good will in the name "North American" which the Board was bound to recognize. Thereupon the Board ordered an investigation to determine whether petitioner's engaging in air transportation under the names North American Airlines, Inc., North American Airlines, or North American was in violation of § 411 and, if so, whether the Board should issue a cease and desist order accordingly, and this investigation was consolidated for hearing and decision with North American's application.

The Board found (1) that American Airlines and North American Airlines are in competition in air transportation; (2) that American Airlines was incorporated, *eo nomine*, and that the term "American" had acquired a secondary meaning before North American adopted the trade name of, and changed its corporate name to, North

agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof."

American Airlines; (3) that the substantial public confusion found herein was likely to continue; (4) that use of the name "North American Airlines, Inc.," "North American Airlines," "North American" or any combination of the word "American" constitutes an unfair or deceptive practice and an unfair method of competition within the meaning of § 411 of the Act; (5) that the public interest required denial of the application for authority to engage in air transportation under the name North American Airlines, Inc.; and (6) that petitioner and its successors, assignees, representatives, agents, officers and employees should be ordered to cease and desist from engaging in air transportation under the names listed in (4), above.

Thereupon, the Board, one member dissenting, entered its order, drastic, as it knew,² and unprecedented, so far

² "We are well aware that an order requiring respondent to cease and desist using the name under which it has been engaging in air transportation is a serious sanction which necessarily involves disturbance and loss to the carrier. We do not impose such a measure lightly. But the record is convincing that the public interest requires this action in order to prevent further public confusion between respondent and intervenor due to similarity of names. The maintenance of high standards in dealing with the public is expected of common carriers, and the public has a right to be free of the inconveniences which flow from confusion between carriers engaging in the transportation of persons by air. The speed of air travel may well be diminished when passengers check in for flights with the wrong carrier, or attempt to retrieve baggage from the wrong carrier, or attempt to purchase transportation from the wrong carrier, or direct their inquiries to the wrong carrier. Friends, relatives or business associates planning to meet passengers or seeking information on delayed arrivals are subject to annoyance or worse when confused as to the carrier involved. The proper handling of complaints from members of the public is impeded by confusion as to the carrier to whom the complaint should be presented. The transportation itself may differ from what the confused purchaser has anticipated (e.g., in

as we have been shown. It purported to predicate public interest upon the "confusion,"³ attributable to North American's "knowing" use of a "confusingly similar name" to that of American. Its brief tells us that there were "six groups of confused members of the public, namely: (1) ticket holding passengers, (2) persons meeting passengers, (3) persons making inquiry regarding transportation, (4) persons having business with petitioner [North American], (5) the Post Office, and (6) the public press." Our examination of the record and the exhibits discloses, (1) some North American passengers with North American tickets in their hands presented themselves at American ticket counters; (2) some people intending to meet North American passengers called American Airlines "information" or ticket counters to ask about the arrival of North American flights; (3) some people who heard North American radio advertising of deferred payment flight plans called American Airlines for particulars as to how North American's "fly now—pay later" program operated: American offered no such plan; (4) "persons having business" were (a) a painter's union official who telephoned to American to protest that a sign was being painted by non-union painters but was assured this was a North American sign; (b) a hotel in Kansas City where North American had "hotelled" its passengers sent its bill to American; (c) a radio repair service telephoned to American about a

terms of equipment), even though the time and place of arrival may be about the same. It is obvious that public confusion between air carriers operating between the same cities is adverse to the public interest, and we have determined that the public should be protected from the effects of the confusion shown on the record by eliminating what we find to be the cause of such confusion."

³ See note 2, *supra*.

North American bill for \$13; (d) a tailor who addressed a North American tailoring charge for \$18 to American although the street number was that of North American; (5) the Post Office misdelivered to American (a) one correctly addressed envelope intended for North American; (b) the tailor bill mentioned in (4)(d) above; (c) in Burbank where both lines had ticket counters at the terminal, a witness said some 6 to 12 envelopes came to the American counter but were intended for the North American counter; (6) a robbery of a North American ticket office was described in the newspapers as having occurred at American's office.

The Board offered no evidence whatever. We have already noted the nature and the gist of such evidence as was offered which was supplied by employees of the intervenor, American, and upon such the Board rested its finding of "confusion." Board Member Adams in his dissent commented:

"Since American Airlines, Inc., carries approximately 51½ million passengers each year over its system, I am not impressed with the fact that witnesses in this case (principally those employed by American Airlines itself) have testified that some confusion has existed. . . . On the contrary, I would be greatly surprised, (in view of the several million phone calls and other communications which American Airlines receives every year over and above those received from passengers which it actually carries) if there were not *some* demonstrable public confusion"

The Board also concluded that the word "American," as used by the intervenor, had acquired a secondary meaning, that intervenor had long engaged in extensive advertising of its services under that name, and that this "practice has helped to instill in the minds of the public the notion that the word 'American' when used in connec-

tion with domestic air transportation denotes American Airlines." In this particular it did not "overlook" "the recent use of the word American in the name of the sectional local service carrier All American Airways," the "recent use of the word American in the name of the irregular carrier Air America," and the international "use of American in the name Pan American World Airways." In this connection it should be noted that American Airlines, Inc., since 1934, and its predecessor American Airways, Inc., since 1930, had continuously been engaged in air transportation. In 1949 American Airlines, Inc., registered in the Patent Office as a service mark the two words in combination, "American Airlines."⁴

No ticket agents were parties to the proceeding, nor was there evidence as to their engaging in proscribed practices within the meaning of the Act, but they as a class, throughout the nation, have been brought within the sweep of the Board's order.

The Board rejected, and decided, it "need not comment" upon, its Examiner's finding:

"There is no evidence of record that North American adopted its name with intent to deceive the public or trade upon the good-will and business reputation of American, or that American has been injured by such operation"

Our examination of the record demonstrates that the Examiner was correct. Nor is there evidence that North American palmed itself off as American; that North American "confused" American's passengers to the former's advantage; that North American's advertising was

⁴ Even were we to assume that such registration is here significant, the likelihood of consumer-confusion is still the test of secondary meaning. *Charles D. Briddell, Inc. v. Al-globe Trading Corp.*, 194 F. 2d 416, 421 (2d Cir. 1952).

intended to or did entice American's passengers to fly North American, indeed it is difficult to assume that North American's advertising could be of the slightest advantage unless it could bring passengers to North American, rather than American. Nor is there evidence that North American flew a single passenger who paid its lower rate in the thought that he contracted for anything but North American's non-scheduled transportation, or that American was harmed otherwise than by the competition afforded by any irregular carrier. In short, the public may have benefited, so far as the record shows, and in any event, there is no demonstration that North American affirmatively acted in violation of a statute within the jurisdiction of the Board.

Except as just noted, the Board adopted, almost *in toto*, the findings of the Examiner, and we quote once more:

"There is no question but what American has acquired during the past 20 years through its constant efforts a good-will in its use of the name 'American' or 'American Airlines,' which has become a valuable asset to be protected. However, an action for infringement of American's trade name can find its remedy in the courts. Section 411 was not designed for the purpose of protecting the private rights of an individual carrier except to the extent of regulating competition between the various air carriers to assure fair competition and thereby maintain a sound economic transportation system; also, equally important, the Board was given the responsibility of safeguarding the public interest against unfair and deceptive methods of competition."

The Examiner came almost to the heart of the problem; his error, like that of the Board, stems from the application of criteria which fell short of the public interest findings demanded by the law.

II

"The Civil Aeronautics Act was enacted at a critical stage in the air transport industry, struggling to survive in the face of excessive competition and a number of other adverse factors. The Act was designed to bring out of chaos a system of regulated competition and the encouragement and promotion of civil aviation, not only in the interests of commerce but also in the interests of national defense." *United Air Lines v. Civil Aeronautics Board*, 198 F. 2d 100, 105 (7th Cir. 1952). "It is also clear that the purpose of the Act is not primarily to advance the private interests of carriers, but the public interest in an adequate air transport system." *Id.* at 107. And see *Civil Aeronautics Board v. State Airlines*, 338 U.S. 572, 578 (1950).⁵

The Act was the culmination of years of groping. By 1937, it became clear that Congress was determined to formulate an over-all policy for the regulation of air transportation. Senator Harry S. Truman as chairman of

⁵ Section 2 of the Act, 49 U.S.C. § 402 (1952), in pertinent part reads:

"In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest . . .

"(a) The encouragement and development of an air-transportation system properly adapted to the present needs of the . . . domestic commerce of the United States. . .

* * * *

"(c) The promotion of adequate, economical and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

"(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the . . . domestic commerce of the United States. . . ."

a Subcommittee of the Senate Committee on Interstate Commerce opened hearings on S. 2 and S. 1760. Representatives of the Air Line Pilots Association denounced the practices of an air line which had been "cheating the pilots out of some measure of the pay which was rightly theirs by means of juggling the seniority of their pilots" and of another air line which "was deliberately flying its pilots far in excess of the maximum flying hours permitted" By such means, it was charged, some bidders for air mail contracts were gaining advantages over others. The Solicitor of the Post Office Department testified that in the past many of the mail contracts had been held or controlled by holding companies and banking interests. Some air lines, he said, had been affiliated with manufacturers from whom they were required to purchase their equipment and to pay prices fixed by the manufacturing companies. There had been interlocking boards of directors, and many if not most of the lines had been dominated by other than practical air line operators. At one time three holding companies had controlled 92 per cent of the air mail contracts then in existence. Some air mail contractors had invaded the territory of others with competitive "off-line" service. When two competitors had submitted bids for the same mail contract the company awarded the contract was bought out by its competitor. Without more than these few cursory references to various situations described to the Senate committee, enough has been said to suggest that sharp conflict and acrimonious exchanges alerted the Congress to the need for action. The spokesman for the leading air lines testified, in part, that ". . . contrary to the condition in any other form of transportation, the Government of the United States is, and for a long time will be, the largest single customer of the air carriers, and in particular cases, among the smaller lines,

this patronage on the part of the Government may exceed the total patronage of all other customers.”⁶

One cannot study the testimony at the hearings without an abiding feeling that the “public interest” concept engrossed or even dominated all concerned. Large outlays of public funds were to be required to aid in promoting the healthy growth of the air transportation industry. Special provisions were written into the legislation to deal with specific and demonstrated past abuses.⁷ Encouragement of competition had a definite place in the declaration of policy, just as the Board “in the interest of the public,” not in furtherance of the private interests of one entity as against another, was empowered to deal with unfair practices or unfair methods of competition.

Undoubtedly the draftsmen realized that many situations would arise which could not with particularity be spelled out in the proposed counterpart of § 411.⁸ It considered the advice of Commissioner Eastman.⁹ “Now, these two bills you have before you follow the usual pattern of regulatory bills. And you will find that much of the language is similar to language which is now already in the law with reference to railroads or with reference to

⁶ *Hearings before United States Senate Subcommittee of the Committee on Interstate Commerce on S. 2 and S. 1760, 75th Cong., 1st Sess. 454 (1937).*

⁷ See, generally, for the business regulative features, §§ 408-416 of the Act, 49 U.S.C. §§ 488-496 (1952). As additional background, see *Two Decades—Federal Aero-Regulation in Perspective*, 12 *Journal of Air Law and Commerce* 105 (1941).

⁸ Cf. the court’s summary of the Board’s argument in *Hawaiian Airlines v. Trans-Pacific Airlines*, 78 F. Supp. 1, 5 (D. Hawaii 1948).

⁹ Chairman of the Legislative Committee of the Interstate Commerce Commission testifying, *Hearings, supra* note 6, at 70.

motor carriers. *That, I think, is a desirable thing, because when language has been interpreted once it is desirable to have it used again; thus avoiding many questions always arising with respect to the employment of new language.*" (Emphasis supplied.) He continued that the pending section "with respect to unfair methods of competition is, I believe, substantially a duplicate of the provisions under the Federal Trade Commission Act, by which the Commission is empowered to prevent unfair methods of competition in ordinary industrial enterprises. I have not studied the decisions of the Federal Trade Commission enough so that I have any clear idea of how far the question of unfair methods of competition may go; and, that is another matter I should like to go further into. But I see no reason, if kept within proper limits, why that provision is objectionable."¹⁰

Thus it adapted to meet prospective needs § 5 of the Federal Trade Commission Act¹¹ and with it, the body of law which had grown up around it. Senator Truman told the Senate, and all parties here concede, that § 411 was so modeled, and we will therefore look to the decisions construing that section to discern the allowable limits for our action.

III

Section 5 of the Federal Trade Commission Act does not provide private persons with an administrative remedy for private wrongs." *Federal Trade Comm'n v. Klesner*, 280 U.S. 19, 25 (1929). "In determining whether a proposed proceeding will be in the public interest the Commission exercises a broad discretion. But the mere fact that it is to the interest of the community that pri-

¹⁰ *Id.* at 74.

¹¹ 15 U.S.C. § 45 (1952).

vate rights shall be respected is not enough to support a finding of public interest. To justify filing a complaint the public interest must be specific and substantial." *Id.* at 28. See also, *Federal Trade Comm'n v. Milling Co.*, 288 U.S. 212, 217 (1933). "This requirement is not satisfied by proof that there has been misapprehension and confusion on the part of purchasers, or even that they had been deceived,—the evidence commonly adduced by the plaintiff in 'passing off' cases in order to establish the alleged private wrong. . . . But to justify the Commission in filing a complaint under § 5, the purpose must be protection of the public." *Federal Trade Comm'n v. Klesner*, *supra* at 27.

"The words 'unfair method of competition' are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade." *Federal Trade Comm'n v. Gratz*, 253 U.S. 421, 427-8 (1920).¹²

What may be "unfair methods of competition" will not admit of precise definition and "are thus to be determined in particular instances, upon evidence, in the light of par-

¹² For other instances of practices found to constitute unfair methods of competition, see *Federal Trade Comm'n v. Milling Co.*, 288 U.S. 212, 217 (1933); *Federal Trade Comm'n v. Keppel & Bro.*, 291 U.S. 304, 310 *et seq.* (1934); *Federal Trade Comm'n v. Cement Institute*, 333 U.S. 683, 690, 691 (1948), and cases cited; cf. *Federal Trade Comm'n v. Bunte Bros.*, 312 U.S. 349, 354 (1941).

ticular competitive conditions and of what is found to be a specific and substantial public interest." *Schechter Corp. v. United States*, 295 U.S. 495, 533 (1935). Protection of the public interest is made of paramount importance, *Federal Trade Comm'n v. Raladam Co.*, 283 U.S. 643, 648 (1931), and even if the Board finds the existence of some unfair method of competition, it "still may not proceed unless it further appear that a proceeding would be to the interest of the public, and that such interest is specific and substantial." *Id.* at 649.¹³

The principles thus enunciated lose none of their force because of the 1938 amendment to § 5 of the Federal Trade Commission Act, indeed they are emphasized in their applicability to the consumer rather than merely to the merchant or the manufacturer. See *Federal Trade Comm'n v. A. P. W. Paper Co.*, 328 U.S. 193, 199 n.4 (1946). In the light of such teaching, therefore, we must approach our present problem. We have found no case with a reach such as is here sought to be applied, indeed it would appear there has been no previous Board decision in which the Board has so sweepingly extended its sway.¹⁴

IV

If this were a private suit in which American had charged North American, with trade-mark infringement and unfair competition, we would be bound to weigh considerations differing from the public interest criteria

¹³ It would seem that the function of the Board like that of the Commission in situations such as this has limitations; certainly under the guise of prohibiting unfair or deceptive practices or unfair methods of competition, it may not impose a code of fair competition upon an industry. Cf. *Schechter Corp. v. United States*, 295 U.S. 495, 531-533 (1935); *New American Library v. Federal Trade Comm'n*, 213 F. 2d 143 (2d Cir. 1954).

¹⁴ See note 2, *supra*.

which must govern our opinion. Myriad cases in the first named categories have compelled the notice of the courts, as may be demonstrated by reference to a few recent decisions.¹⁵ "For our purpose, cases brought in the federal courts in the field of unfair competition (not including Federal Trade Commission cases) may be divided into six categories" said the court in *Philco Corporation v. Phillips Mfg. Co.*, 133 F.2d 663, 666 (7th Cir. 1943), and fruitful reference may be made to the analysis found at pages 666-667. Developments in this field are also discussed at interesting and valued length by Judge Frank, concurring, in *Standard Brands v. Smidler*, 151 F. 2d 34, 37 (2d Cir. 1945). He observes, *Id.* at 38 n.2, "The trade-name monopolies arising under the Federal Trade Commission Act are in a different category." If this were a private suit, whether American's registration of "American Airlines" as a service mark gives it anything more than a procedural advantage, *Armstrong Co. v. Nu-Enamel Corp.*, 305 U.S. 315, 324 (1938), whether the Lanham Act, 15 U.S.C. §§ 1051-1127 (1952), confers a new federal right against unfair competition, *Charles D. Bridgell, Inc. v. Alglobe Trading Corp.*, 194 F. 2d 416, 421 (2d Cir. 1952), or whether the mere likelihood of confusion of the public

¹⁵ *Hyde Park Clothes v. Hyde Park Fashions*, 204 F. 2d 223 (2d Cir. 1953), *cert. denied*, 346 U.S. 827 (1953); *Charles D. Bridgell, Inc. v. Alglobe Trading Corp.*, 194 F. 2d 416 (2d Cir. 1952); *Admiral Corp. v. Penco, Inc.*, 203 F. 2d 517 (2d Cir. 1953); *S. C. Johnson & Son, Inc. v. Johnson*, 116 F. 2d 427 (2d Cir. 1940); *Q-Tips, Inc. v. Johnson & Johnson*, 206 F. 2d 114 (3d Cir. 1953), *cert. denied*, 346 U.S. 867 (1953); *Radio Shack Corp. v. Radio Shack*, 180 F. 2d 200 (7th Cir. 1950); *Best & Co. v. Miller*, 167 F. 2d 374 (2d Cir. 1948); *McGraw-Hill Pub. Co. v. American Aviation Associates*, 73 App. D.C. 131, 117 F. 2d 293 (D.C. Cir. 1940); *Mastercrafters Clock Co. v. Vocheron Watches, Inc.*, 105 U.S.P.Q. 160, — F. 2d — (2d Cir. 1955); *G. B. Kent & Sons v. P. Lorillard Co.*, 114 F. Supp. 621 (S.D.N.Y. 1953), *aff'd*, 210 F. 2d 953 (2d Cir. 1954).

as between the goods and services of the parties will predicate relief, may become important or even controlling factors after test by appropriate defenses.

But we are not here concerned with the possibility that American might prevail in private litigation, and nothing we say is intended to bear one way or the other upon issues which might develop in such an action. The Board in its brief tells us that "Petitioner's name is differentiated from intervenor's only by the addition of a one-syllable prefix." It cites cases accordingly. *Material M. M. Ass'n v. New York M.M.M. Ass'n*, 169 App. Div. 843, 155 N.Y.S. 706, 710 (1st Dept. 1915); *American Thread Co. v. North American Thread Co.*, 33 F. Supp. 616 (S.D.N.Y. 1935); *Speed Products Co. v. Timmerman Products*, 179 F. 2d 778, 780 (2d Cir. 1949); *American Home Benefit Ass'n v. United American Benefit Ass'n*, 63 Idaho 754, 125 P. 2d 1010 (1942); *Northern Metal Co. v. Maier*, 337 Pa. 257, 11 A. 2d 140 (1940); *Navy Club v. All-Navy Club*, 85 F. Supp. 679, 682 (D.R.I. 1949). But were we to say that private injury criteria must govern the issue here, we would also be bound to observe that these and offsetting cases point up clearly that there is no inflexible rule and the circumstances in each situation must be considered: See, e.g., *McGraw-Hill Pub. Co. v. American Aviation Associates*, 73 App. D.C. 131, 117 F. 2d 293 (D.C. Cir. 1940) ("American Aviation" and "Aviation"); *Pure Oil Co. v. The Pep Boys*, 76 U.S. App. D.C. 19, 128 F. 2d 34 (D.C. Cir. 1942); *Eastern Wine Corp. v. Winslow Warren, Ltd.*, 137 F. 2d 955, 956 (2d Cir. 1943), cert. denied, 320 U.S. 758 (1943) ("Chateau Martin" and "Chateau Montay"); *Fawcett Publications v. Bronze Publications*, 173 F. 2d 778 (5th Cir. 1949) cert. denied, 338 U.S. 869 (1949) ("True Confessions" and "Bronze Confessions"); *Coca-Cola Co. v. Snow-Crest Beverages*, 162 F. 2d 280 (1st Cir. 1947), cert. denied, 332 U.S. 809 (1947) ("Coca-Cola" and "Polar Cola").

Even in the last named cases the test could be said to be whether the addition of a prefix or an extra nominate term renders the corporate name "so distinct that confusion is unlikely." *Pure Oil Co. v. The Pep Boys, supra* at 19.

Perhaps the injection of one additional idea will suffice to show how murky are the waters in which the Board would fish. In *Columbia Mill Company v. Alcorn*, 150 U.S. 460, 466 (1893), the Court said: "The appellant was no more entitled to the exclusive use of the word 'Columbia' as a trade-mark than he would have been to the use of the word 'America,' or 'United States,' or 'Minnesota,' or 'Minneapolis.' These merely geographical names cannot be appropriated and made the subject of an exclusive property." Cf. *Durable Toy & Novelty Corporation v. J. Chein & Co.*, 133 F. 2d 853, 855 (2d Cir. 1943), *cert. denied*, 320 U.S. 211 (1943), where Judge Learned Hand pointed out that "... 'Uncle Sam' is part of the national mythology, not entirely unlike the flag, or any other part of our inherited patriotic paraphernalia; all have a measurable interest in its use"; *Patent Paint Co. v. Sunset Paint Co.*, 53 App. D.C. 348, 351, 290 Fed. 323 (D.C. Cir. 1923), where this court considered Sun as publici juris. Congress "has been given no power to legislate upon the substantive law of trade-marks," and it reasonably may be assumed that "the intention was to allow the registration of such marks as that law, and the general law of unfair competition of which it is a part, recognized as legitimate." *American Foundries v. Robertson*, 269 U.S. 372, 381 (1926). The Court continued at 383, "There may be, of course, instances where a single word in the corporate name has become so identified with the particular corporation that whenever used it designates to the mind of the public that particular corporation. But it is not here shown that, standing alone, the word 'Simplex' has that effect; that it is any

more calculated to denote to the public the defendant corporation than any of the other corporations in the names of which it is likewise embodied; or, indeed, that it signifies the appropriation of some corporate name though incapable of exact identification.

There are many instances, of which the public must be presumed to have knowledge, of similarities in airlines designations indicating a not uncommon practice of this sort in the air transportation industry. Exhibits in the record here disclose airlines routes allocated by the Board to All American Airways, Inc., American Airlines, Inc., Northeast Airlines, Inc., Eastern Air Lines, Inc., Northwest Airlines, Inc. and Western Airlines, Inc. Pan American and Air American were previously mentioned.¹⁶ Phonetic differences, lack of emphasis in petitioner's use of the disputed term, possible failure of the intervenor's advertising campaigns, differences in service, rates and the elements of the airlines traveling public each has sought to reach, would seem to serve here to distinguish the two competing companies. Were we to continue this collateral discussion we might observe with the court in *Eastern Wine Corp. v. Winslow Warren, Ltd.*, 137 F. 2d 955, 960 (2d Cir. 1943), *cert. denied*, 320 U.S. 758 (1943): "The issue in such a case as this is 'whether an appreciable number of prospective purchasers of the goods * * * are likely' to be confused. 'That a few particularly undiscerning prospective purchasers might be misled is not enough.'" Even in such adversary litigation between competitors, the obligation resting upon one is not to insure that every purchaser will distinguish it from

¹⁶ Exhibits in the Congressional hearings, *supra*, note 6, disclose air mail contractors such as North American Aviation, Inc., American Airlines, Inc., Northwest Airlines, Inc., Western Air Express Corp., Transcontinental and Western Air, Inc., National Park Airways, Inc. and National Air Transport.

its competitor, but only to use "reasonable means to prevent confusion." *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111, 121 (1938). "A new competitor is not held to the obligations of an insurer against all possible confusion. He is not obligated to protect the negligent and inattentive purchaser from confusion resulting from indifference. *Skinner Mfg. Co. v. General Foods Sales Co., Inc.*, D.C., 52 F. Supp. 432, 433, 450. It has been said that he is not required to make the market 'foolproof.' [Citing cases]. " * * * Instead, they are required only to mark or designate them in such manner that purchasers exercising ordinary care to discover whose products they are buying will know the truth and not become confused or mistaken. * * * " *Life Savers Corp. v. Curtiss Candy Co.*, 182 F. 2d 2, 8 (7th Cir. 1950). See also, *McGraw-Hill Pub. Co. v. American Aviation Associates*, 73 App. D.C. 131, 117 F. 2d 293 (D.C. Cir. 1940).

Against the foregoing background, perhaps already too extensively portrayed, one thing seems crystal clear: that if Congress has "been given no power to legislate upon the substantive law of trade-marks" it is utterly unlikely that Congress constituted the Board a forum to adjudicate the complicated issues arising in this field. We will not say that under no circumstances can name appropriation in simulation of or in general resemblance to the name of another air line result in an unfair trade practice or an unfair method of competition, quite the contrary.¹⁷ But the mere combination of the words "North"

¹⁷ See, e.g., *Aetna Casualty & Surety Co. v. Aetna Auto Finance*, 123 F. 2d 582, 584 (5th Cir. 1941), cert. denied, 315 U.S. 824 (1942), and cases cited; *Greyhound Corporation v. Goberna*, 128 F. 2d 806 (5th Cir. 1942); *Standard Oil Co. of Maine v. Standard Oil Co. of New York*, 45 F. 2d 309 (1st Cir. 1930); *Standard Oil Co. of New Mexico v. Standard Oil Co. of Cal.*, 56 F. 2d 973, 977 (10th Cir. 1932), and cases cited in note 1.

and "American," the latter so commonly used in business enterprises, even in the airlines industry, without more—much more than is disclosed upon this record—is not the unfair practice or the unfair method of competition over which the Board, in the public interest, has jurisdiction. Our duty is to "make certain that the legislative enactment is within Constitutional limitations, that the executive program is within statutory limitations, and that a disputed executive action is within the terms of the legislative mandate, fairly based on facts fairly found, and not arbitrary, capricious or fanciful." *United Air Lines v. Civil Aeronautics Board*, 81 U.S. App. D.C. 89, 91, 155 F. 2d 169 (D.C. Cir. 1946).

V

What Congress in the public interest sought to reach in its original § 411 of the Act may be illustrated by what was said of the recent amendment extending the provision to "ticket agents."¹⁸ Types of practices and abuses were carefully spelled out,¹⁹ each of the sort for

¹⁸ Act of July 14, 1952, 49 U.S.C. § 491 (1952).

¹⁹ House Rep. No. 2420, 82d Cong., 2d Sess. (1952), reads in part:

"The necessity for the proposed legislation is occasioned by the fact that a number of ticket agents have engaged in flagrant abuses and deceptions in the sale of air transportation to the great detriment of the public. For example, ticket agents have engaged in such practices as the following:

"(1) Deceptive advertising and other public representations which induce the public to believe that the agent is an air carrier and to rely on such agent to provide the air transportation service offered when in fact the agent is not authorized to engage in air transportation but is depending upon the performance of the service by some authorized air carrier undisclosed to the prospective passenger and in many instances unknown to the agent at the time the representa-

which a public body might be expected to provide a remedy in the public interest where resort by an individual

tion is made or the same is consummated.

"(2) Deceptive and misleading advertising and other public representation as to the quality and kind of service, cost, type and size of aircraft, times of departure and arrival, points served, route to be flown, stops to be made, and total trip time from point of departure to designation.

"(3) Offer and sale of air transportation without regard to the rates, fares, and charges specified in the tariffs of air carriers represented, discriminating between passengers, charging some more and some less than lawful tariff rates, demanding and collecting extra improper charges which in some instances are exacted to make up the difference between the lower rate offered purposely as a 'come-on' to bring the prospective purchaser to the agent's place of business and the correct rate which should have been advertised to the public.

"(4) Selling air transportation on a reservation basis when the agent has no binding commitment with any air carrier to provide the service. In such instances the passenger is later informed that the flight will be delayed, or he finds upon arrival at the airport that there is no space for him, or that there is no flight as represented. The passenger then must wait until the agent finally arranges for this passage on another flight or another carrier which may be hours or days later and may be at a higher fare or under less desirable circumstances or on less desirable types of aircraft than that represented at the time of sale.

"(5) Falsely representing that passengers are directly insured in large amounts when in fact no such insurance is in force.

"(6) Falsely representing that special 'priorities' for reservations and special discounts are available, particularly for persons in military service when in fact no such special considerations are available.

"(7) Failure and refusal to make proper refunds when flights are not available or only partially completed.

"These practices arose with the development of the irregular air carrier operations after the close of World War II and have become more widespread and serious each year.

to the courts would largely be fruitless or impracticable. As the Federal Trade Commission Act's § 5 had been made the model, so, too, in the Civil Aeronautics Act, § 411 was a novelty. It was a "new device" introduced by Congress "in the hope thereby of remedying conditions in business which a great majority of the American people regarded as menacing the general welfare, and which for more than a generation they had vainly attempted to remedy by the ordinary processes of law. It was believed that widespread and growing concentration in industry and commerce restrained trade and that monopolies were acquiring increasing control of business." Mr. Justice Brandeis, dissenting, in *Federal Trade Comm'n v. Gratz*, 253 U.S. 421, 432 (1920). It would seem that without more, protection by the Board of a name monopoly, employing the vast force of the United States in its support, is far outside the scope of the powers entrusted to the Board. Especially do we so conclude upon reconsideration of the Act's pertinent policy declarations, set forth in note 2, *supra*.

We are reinforced in our conviction by a review of the leading cases²⁰ in which the Supreme Court has clearly taught the nature and the substance of the public interest to be considered and the criteria to be applied in proceedings under the Federal Trade Commission Act. Since that body of law likewise surrounds the bare bones of § 411 of the Act before us, we must be guided accordingly. Given an order in a case which falls within the standards of illegality thus connoted, with adequate explanation of the reasons why the public interest demands such an order, and a determination based upon adequate supporting evidence that the respondent has engaged in the conduct to be condemned, we will sustain the Board.

²⁰ See appendix.

This is not such a case, and when as a matter of law we so conclude, it is our duty to set aside the Board's order. We do so.

Reversed.

APPENDIX

The following succinct summary of some of the leading cases referred to in note 20 of the opinion may prove of convenience to counsel.

Federal Trade Comm'n v. Gratz, 253 U.S. 421, 425 (1920), affirmed a court of appeals decision holding that the Commission "has no jurisdiction to determine the merits of specific individual grievances."

Federal Trade Comm'n v. Beech-Nut Co., 257 U.S. 441 (1922), enforced a Commission order against a resale price maintenance scheme which suppressed competition and obstructed a free flow of commerce.

Federal Trade Comm'n v. Winsted Co., 258 U.S. 483 (1922), enforced a Commission order where goods, falsely branded as "Natural Merino" or otherwise as wool in fact were largely cotton.

Federal Trade Comm'n v. Eastman Co., 274 U.S. 619 (1927), held that the Board had no power to order the Company to divest itself of physical property acquired prior to Commission action even though the property acquired and held was in furtherance of a scheme of unfair competition. At page 623 the Court said: "The Commission exercises only the administrative function delegated to it by the Act; not judicial powers. [Citing cases] It has not been delegated the authority of a court of equity."

Federal Trade Comm'n v. Klesner, 280 U.S. 19 (1929), refused enforcement where mere confusion in competing business names failed to establish "specific and substantial" public interest.

Federal Trade Comm'n v. Raladam Co., 283 U.S. 643, 652-653 (1931), denied enforcement of an order against a dangerously misleading obesity "cure" where there was a failure of demonstration that advertising "substantially injured or tended thus to injure the business of any competitor

or of competitors generally. . . ." Compare *Federal Trade Comm'n v. Raladam Co.*, 316 U.S. 149 (1942).

Federal Trade Comm'n v. Milling Co., 288 U.S. 212 (1933), enforced an order against respondents who called themselves milling companies but ground no grain, thus deceiving the public.

Federal Trade Comm'n v. Algoma Co., 291 U.S. 67 (1934), enforced a Commission order against some fifty manufacturers with widespread market who resorted to use of a trade name "California White Pine" upon a much inferior and cheaper species of pine, resulting in complete misrepresentation of the thing supplied.

Federal Trade Comm'n v. Keppel & Bro., 291 U.S. 304 (1934), enforced an order against unlawful competition by many manufacturers of candy who enticed children to buy through resort to a sales scheme which included a chance of their getting their money back.

Federal Trade Comm'n v. Education Society, 302 U.S. 112 (1937), enforced a Commission order against false representations, inter alia, that books were free where many teachers and others testified to being deceived and deluded.

Federal Trade Comm'n v. Bunte Bros., 312 U.S. 349 (1941), refused an order against an intra-state candy sale scheme, like that in the *Keppel* case, but referred to examples of unfair competition, "which run the gamut from bribing employees of prospective customers to selling below cost for hindering competition." 312 U.S. at 354 n.4.

Fashion Guild v. Federal Trade Comm'n, 312 U.S. 457 (1941), held that purposes and practices contrary to the Sherman Act and the Clayton Act were within the Commission's jurisdiction where one hundred seventy six manufacturers and thousands of retailers combined to restrain competition, especially where an organized boycott of nonconforming competitors had a tendency to create monopoly.

Siegel Co. v. Federal Trade Comm'n, 327 U.S. 608 (1946), outlined the problem presented upon judicial review where the Commission had failed to consider or make findings as to whether a trade name, Alpacuna, could be saved.

Federal Trade Comm'n v. A. P. W. Paper Co., 328 U.S. 193 (1946), refused enforcement of a Commission order forbidding the use of "Red Cross" in advertising where there was no fraud but where some of the public thought that goods were made in accordance with standards of,

or by virtue of some connection with, the American Red Cross. (And see p. 199 and note 4 concerning the effect of the 1938 amendment to the Federal Trade Commission Act.)

Price differential problems under the Robinson-Patman Act, *Federal Trade Comm'n v. Morton Salt Co.*, 334 U.S. 37 (1948); *Federal Trade Comm'n v. Ruberoid Co.*, 343 U.S. 470 (1952); *Federal Trade Comm'n v. Minneapolis-Honeywell Co.*, 344 U.S. 206 (1952), where Commission orders were sustained, may be compared with those in *Standard Oil Co. v. Federal Trade Comm'n*, 340 U.S. 231 (1951), and *Automatic Canteen Co. v. Federal Trade Comm'n*, 346 U.S. 61 (1953), where enforcement was refused. Exclusive contracts as restraint of competition and possessing a tendency to monopoly were considered in *Federal Trade Comm'n v. Motion Picture Adv. Co.*, 344 U.S. 392 (1953), and comparable questions in yet other cases we need not cite.

[fols. 437-439] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT, APRIL TERM, 1955

No. 12,041

NORTH AMERICAN AIRLINES, INC., Petitioner,

v.

CIVIL AERONAUTICS BOARD, Respondent,

AMERICAN AIRLINES, INC., Intervenor

On Petition for Review of Order of the Civil Aeronautics
Board.

Before Prettyman, Fahy and Danaher, Circuit Judges

JUDGMENT AND DECREE—June 23, 1955.

This case came on to be heard on the record from the Civil Aeronautics Board, and was argued by counsel.

On consideration whereof, It is adjudged and decreed by this Court that the order of the Civil Aeronautics Board on review in this case be, and the same is hereby, reversed and set aside, and that this case be, and it is hereby, remanded to the said Civil Aeronautics Board for further proceedings not inconsistent with the opinion of this Court.

Dated: June 23, 1955.

Per Circuit Judge Danaher.

[fol. 440] Clerk's Certificate to foregoing transcript
omitted in printing.

[fol. 441] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1955

No. 410

AMERICAN AIRLINES, INCORPORATED, Petitioner,

vs.

NORTH AMERICAN AIRLINES, INCORPORATED

ORDER ALLOWING CERTIORARI—Filed November 14, 1955

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(5557-4)

Office: Supreme Court, U. S.

FILED

SEP 21 1955

HAROLD B. WILLEY, Clerk

No. 410

IN THE
Supreme Court of the United States

OCTOBER TERM, 1955

AMERICAN AIRLINES, INC., *Petitioner,*

v.

NORTH AMERICAN AIRLINES, INC., *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1955

No.

AMERICAN AIRLINES, INC., *Petitioner*,

v.

NORTH AMERICAN AIRLINES, INC., *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the District of Columbia Circuit which reversed an order entered by the Civil Aeronautics Board.

OPINIONS BELOW

The opinion of the Court of Appeals (R. 411-435) is printed in the Appendix hereto. It is not yet reported. The opinion of the Civil Aeronautics Board, together with those findings of its Examiner as were specifically adopted by the Board, appears at pages 199-229 of the Record herein. The full Initial Decision of the Examiner is reported at pages 183-199 of the Record.

JURISDICTION

The judgment of the Court of Appeals was entered on June 23, 1955 (R. 411). No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Section 411 of the Civil Aeronautics Act (49 U.S.C. § 491) is adapted from Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45) and is designed to prevent "unfair or deceptive practices or unfair methods of competition in air transportation." The Act empowers the Civil Aeronautics Board, either on complaint of an air carrier or on its own initiative, to institute a proceeding "if it considers that such action by it would be in the interest of the public" and, after notice and hearing, to order an air carrier to cease and desist from continuing any violation found by the Board.

From 1920 to 1930 Section 5 of the Trade Commission Act was seriously crippled by rulings and dicta in opinions of this Court to the effect that unfair methods of competition require a showing of fraud, deception of consumers by palming off, and injury to a competitor. Such views, however, were subsequently repudiated by Congress and this Court.

In a Section 411 proceeding before the Civil Aeronautics Board where the air carrier requests an order to prevent a competitor from continuing to advertise and use a recently adopted name confusingly similar to the name of the complainant carrier previously long established and extensively advertised, and where a cease and desist is entered on the basis of the findings of fact revealing that the similarity of names causes

the public widespread and serious confusion and inconvenience through checking in with the wrong carrier, attempting to purchase transportation from the wrong carrier, seeking baggage from the wrong carrier, meeting flights of the wrong carrier, and otherwise:

1. Is Section 411 to be seriously crippled by a judicial gloss—identical with the early but now repudiated views of Section 5 of the Trade Commission Act—holding that the cease and desist order eliminating the public confusion must be reversed on the ground that there can be no unfair or deceptive practice and no unfair method of competition unless there is a showing of fraudulent intent to deceive, “palming off” by deception, and injury to a competitor?
2. Does any vitality remain in the rule announced in *Federal Trade Commission v. Klesner*, 280 U.S. 19 (1929), to the effect that “public interest” is an issue subject to judicial review under Section 5 of the Federal Trade Commission Act, and if so, to what extent, if any, does the *Klesner* rule have application in a Section 411 proceeding before the Civil Aeronautics Board whose jurisdiction, unlike the Federal Trade Commission’s extends over a specific segment of the national economy in which the Board is truly a specialist in determining the public interest?

STATUTE INVOLVED

Section 411 of the Civil Aeronautics Act, 52 Stat. 103 (1938), as amended 66 Stat. 628 (1952), 49 U.S.C. § 491, reads as follows:

“The [Civil Aeronautics] Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or

ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition."

While there are considerable differences in form, it will be noted that there is a close substantive similarity between the foregoing section and Section 5 of the Federal Trade Commission Act, pertinent excerpts from which are printed in the margin.* A notable

* "Sec. 5. (a) Unfair methods of competition in commerce; and unfair or deceptive acts or practices in commerce, are declared unlawful

* * *

"The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce

"(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue . . . a complaint stating its charges If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall make a report in writing . . . and shall issue . . . an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice." 38 Stat. 719 (1914), as amended, 52 Stat. 111 (1938), 52 Stat. 1028 (1938), 64 Stat. 21 (1950), 66 Stat. 632 (1952), 15 U.S.C. § 45.

difference between the two is that the Civil Aeronautics Act, unlike the Trade Commission Act, empowers the Civil Aeronautics Board to proceed upon a complaint by an air carrier as well as upon its own initiative.

STATEMENT

This is the first case in court involving the interpretation and application of Section 411 of the Civil Aeronautics Act.

The petitioner, American Airlines, Inc., is engaged in air transportation pursuant to certificates of public convenience and necessity under the Civil Aeronautics Act (R. 220).^{*} In 1934 it was incorporated under its present name and ever since has engaged in extensive air carrier service, scheduled and otherwise, under the name of American Airlines; its predecessor had also operated extensively as an air carrier under the name "American Airways" for four years prior to the incorporation of the petitioner (R. 220). In the words of the respondent's counsel, petitioner is considered "by a great part of the traveling public probably the top airline, the best known airline, in the United States" (R. 83).

The respondent is a North Carolina corporation, but its principal office is in California (R. 1). It engages in air transportation as a large irregular carrier under the authority of a Letter of Registration issued to it by the Civil Aeronautics Board pursuant to Section 416 of that Act (R. 3-4). At the time of the issuance of the Letter of Registration, respondent's corporate name was Twentieth Century Airlines, Inc. and the

^{*} Pages 1 through 317 of the Record consist of the Joint Appendix below which had the same pagination.

Letter of Registration was issued to it in that name (R. 3-4). Without making any effort to change its registered name and without notifying the Board in any manner, the respondent on April 21, 1951 began offering air transportation services to the public under the fictitious name of North American Airlines (R. 220, 309). Thereafter, on May 21, 1951 the respondent filed in the office of the County Clerk of the County of Los Angeles, California, a certificate of conducting business under the fictitious name of North American Airlines, and on March 3, 1952 it amended its articles of incorporation so as to change its corporate name from Twentieth Century Airlines, Inc. to North American Airlines, Inc. (R. 1).

The petitioner and the respondent directly compete on one of the most heavily travelled air routes in the country—Los Angeles-Chicago-New York (R. 220).

On August 19, 1952, the Civil Aeronautics Board adopted its Business Name Regulation, and the section here involved appears as Part 291.28 of the Board's Economic Regulations (R. 295-298; 14 C.F.R. 291.28). The validity of this Regulation has not been challenged. In substance, the Regulation provides that an air carrier, in dealing with the public and in performing air transportation services, must secure permission of the Board to use any name different from the name in its operating authority. In the preamble of the Regulation, however, the Board announced that, where a different name has already been used by a carrier to build up goodwill, such name will be barred only if its use is found after notice and hearing to contravene Section 411 of the Civil Aeronautics Act.*

*The full text of the regulation and the prefatory statement is printed at pp. 295-298 of the Record. This regulation appears in

Pursuant to this Regulation, the respondent applied to the Civil Aeronautics Board on October 6, 1952 for permission to use the name North American Airlines, Inc., (R. 1) and the proceeding on the application was assigned Docket No. 5774 (R. 3).

The petitioner thereupon objected to the grant of the application in Docket No. 5774, and complained that the use and advertising of the name North American Airlines caused the public to confuse the identity of the respondent with that of the petitioner and constituted an unfair or deceptive practice or unfair method of competition in violation of Section 411 of the Civil Aeronautics Act (R. 5).

The Civil Aeronautics Board in a single order set for hearing before an Examiner respondent's application to change its registered name, Docket No. 5774; assigned Docket No. 5928 to a proceeding under Section 411 of the Act in response to the petitioner's objection and complaint that use of the name North American Airlines was in violation of that section; and consolidated the proceeding in Docket No. 5774 with the proceeding in Docket No. 5928 for hearing before the same Examiner (R. 3-5). In another order the petitioner, as the complainant, was permitted to intervene and become a party to support the allegations in its complaint to the Board (R. 6-7).

14 C.F.R. § 291.28, but there the prefatory statement has been omitted. It should also be noted that several regulations—substantively identical—were adopted simultaneously, each regulation being applicable to a different type of carrier in accordance with their different types of operating authority. Thus, one regulation was applicable to carriers holding certificates of convenience and necessity (14 C.F.R. § 202.8), whereas another regulation was applicable to the large irregular carriers holding letters of registration (14 C.F.R. § 291.28).

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The only issue in this consolidated proceeding was whether the respondent's use of and advertising itself under the name North American Airlines, Inc., (or "North American") was an unfair or deceptive practice or an unfair method of competition within the purview of Section 411 (R. 210, n. 10).

At the hearing before a Civil Aeronautics Board Examiner in the consolidated proceeding, both the petitioner (R. 221) and the respondent (R. 223) introduced evidence. Sixteen witnesses testified and numerous exhibits were received in evidence. In due course the Examiner issued an exhaustive Initial Decision finding that the respondent's use of the North American name violated Section 411 (R. 184-199). The respondent filed elaborate exceptions with the Civil Aeronautics Board, and after the normal procedure of briefing and oral argument (R. 200) the Board issued its decision accompanied by an opinion (R. 199-229) in which it specifically adopted numerous of the findings made by the Examiner and entered additional findings and conclusions of its own, on the basis of which it entered a cease and desist order against the respondent under Section 411 (R. 229-230).

FINDINGS AND DECISION OF THE CIVIL AERONAUTICS BOARD

On the evidence the Board found that the public confused the respondent with the petitioner because of the respondent's use of the names North American and North American Airlines and their similarity to the names commonly understood to refer to the petitioner, i.e., American and American Airlines (R. 201).*

* Both before the Board and before the lower court the respondent argued that the words "American" and "American Airlines" have not acquired a secondary meaning signifying the petitioner.

This confusion existed not only among passengers and persons inquiring for flight information, but even among merchants and creditors (R. 201-202)—though “The bulk of the confusion shown in the record was on the part of persons reasonably identified as prospective or actual purchasers of air transportation” (R. 202).

Likewise, the Board squarely rejected the respondent's contention that the confusion was not “substantial or widespread” (R. 204-205). While the Board found it unnecessary to endorse the Examiner's numerical estimate that the instances of confusion in the Los Angeles area alone amounted to some 200 a week, its analysis of the evidence showed that the confusion was, indeed, substantial in amount and was not *de minimis* as the respondent had contended (R. 205-206).

The nature of this widespread confusion was found by the Examiner, in findings adopted by the Board, as follows:

“The above evidence generally involved numerous inquiries on the part of the public made to American employees concerning service, rates, routes, and schedules of North American under the mistaken impression that North American and American were one and the same airline.

“An officer of American testified that he had received from employees under his supervision numerous inquiries indicating confusion between

The lower court's opinion does not adopt the respondent's view, and the Board's findings of fact are quite conclusive:

“There is no doubt that the word American, used in connection with domestic air transportation, is widely known as meaning the [petitioner] . . . and that the phrase American Airlines is also understood to refer to [petitioner] . . . and not to denote the airlines of this nation or continent generally.” (R. 207)

American Airlines and North American Airlines, and that * * * his office had received a telephone call from a representative of a trade union, complaining that an American sign was being painted by non-union painters, and upon investigation it was found that the sign was that of North American. There were instances of air passengers holding North American tickets attempting to check in for North American flights at American ticket counters—in fact, at the Burbank office this was a daily occurrence—and many of the passengers were still confused after an explanation had been made that American and North American were two different airlines. There were instances where North American passengers attempted to claim their baggage at the American counter; also other instances where prospective passengers insisted they were entitled to a discount for transportation on American because they held a 'Buyers League Scrip Book.' Upon an investigation by the passengers making the inquiries, it was learned that it was North American instead of American which offered a discount.

"There were other instances of persons meeting incoming North American passengers who made inquiries at the American ticket counter at Burbank to determine time of arrival. Other inquiries were made of American agents at Los Angeles concerning an \$80 fare from Los Angeles to New York, which the persons had heard advertised on television, and upon investigation it was found that it was North American they were referring to and not American. One witness testified that she had heard people state that they were under the impression that North American and American were the same or affiliated companies. Another witness for American testified that one person insisted that American flew from New York to Miami because she had heard a radio program to that effect, whereas the program in question was that of North

American. There were instances where mail addressed to North American was delivered to American Airlines' office. Tradesmen have dunned American for bills owed by North American and hotels have requested American's advice as to billing for hotel charges incurred by North American crews. A witness for American stated that at its Burbank office the president of North American, who is on duty at the North American ticket counter at Lockheed air terminal, informed her that many persons would stop at his counter and request tickets to Dallas, Oklahoma City, or Tulsa, points which North American did not serve, and he would realize that the passengers were confused and that they were under the impression it was American's ticket counter. *The president further stated to the witness that if the passengers were destined to New York or Chicago he would do everything he could to 'steal' them.*

"There were many other instances similar to those referred to above that need not be repeated here. In general, they indicate that certain confusion exists on the part of the public in distinguishing the services of the two airlines in question." (R. 221-223) (Emphasis added)

The respondent had also argued to the Board that there was no showing of actual fraudulent intent in the adoption of the North American name. The Board made no specific finding that there was such intent, but did find that the name was adopted when "American Airlines was universally known in air transportation", and that the use of a similar name was "not accidental or inadvertent, but rather was knowing." (R. 207). It was also found that the respondent's own evidence showed that it advertised itself as "one of the nation's four great airlines" which was not "even close to being true of respondent", whereas American

"is in fact one of the four largest domestic air carriers, a group commonly referred to as the 'Big Four.'" (R. 207, 208 n. 8.)

Finally the Board found:

"... the record is convincing that the public interest requires this action in order to prevent further public confusion between Respondent and intervenor due to similarity of names. The maintenance of high standards in dealing with the public is expected of common carriers, and the public has a right to be free of the inconveniences which flow from confusion between carriers engaging in the transportation of persons by air. The speed of air travel may well be diminished when passengers check in for flights with the wrong carrier, or attempt to retrieve baggage from the wrong carrier, or attempt to purchase transportation from the wrong carrier, or direct their inquiries to the wrong carrier. Friends, relatives or business associates planning to meet passengers or seeking information on delayed arrivals are subject to annoyance or worse when confused as to the carrier involved. The proper handling of complaints from members of the public is impeded by confusion as to the carrier to whom the complaint should be presented. The transportation itself may differ from what the confused purchaser had anticipated (e.g., in terms of equipment), even though the time and place of arrival may be about the same. It is obvious that public confusion between air carriers operating between the same cities is adverse to the public interest, and we have determined that the public should be protected from the effects of the confusion shown on the record by eliminating what we find to be the cause of such confusion." (R. 208-209)

The Board concluded, as had its Examiner, that the respondent's use of the name "North American Air-

lines", "North American" or any combination of the word "American" constitutes an unfair or deceptive practice and an unfair method of competition (R. 210-211). Accordingly, it determined that the respondent and its agents should be ordered to cease and desist from engaging in air transportation under such names (R. 210-211), and an appropriate order was entered (R. 229-230).

One of the five Board members dissented, with a dissenting opinion (R. 211-218).

THE OPINION AND DECISION OF THE LOWER COURT

The respondent duly petitioned the lower court to review the Board's order. The petitioner intervened (R. 311).

The issues on the appeal were precisely defined by prehearing stipulation approved by the court (R. 306-311). Those issues, it was agreed, were limited to the following:

1. Did any combination of the Board's findings "establish a violation of Section 411, because of the use by the [respondent] of the name North American Airlines, Inc., North American Airlines or North American"?
2. Did the Board's findings "establish a secondary meaning connoting American Airlines, Inc., in the words 'American' and 'American Airlines' "?
3. Did the Board find that the respondent's use of the North American name was fraudulent?

The only other issues set forth in the agreed statement related to questions as to whether various of the find-

ings as to the existence of confusion, its probability, etc., were supported by substantial evidence.*

The lower court's opinion did not overturn the Board's findings of fact. On the contrary, it quoted some of the findings and paraphrased others, and referred in summary form to a part of the evidence. The defect it found in the Board's decision was, as respondent had contended, that findings essential to a Section 411 case had not been made.

The opinion below consists of five separately numbered sections. In Section I—which concludes that the “error of the Board stems” from the failure to make “findings demanded by the law” (R. 418; *infra* p. vii)—there is set forth the nature of the missing findings which the court regarded as essential. The discussion begins with a quotation of a statement made by the Examiner in his Initial Decision:

“There is no evidence of record that North American adopted its name with *intent to deceive* the public or trade upon the good-will and business reputation of American, or that *American has been injured* by such operation . . .” (Emphasis added) (R. 417; *infra*; p. vi)

The court's opinion then says that its examination of the evidence shows that the Examiner's negative find-

* It will be observed that on the appeal no issue was tendered bearing on the scope of the Board's order or its appropriateness as a means for remedying the Section 411 violation if such a violation were properly found to exist. Hence the problem dealt with in *Jacob Siegel Co. v. Federal Trade Commission*, 327 U.S. 608, 612-613 (1946), as to whether some alternative form of order should have been entered, is not involved in this case. See also, *Federal Trade Commission v. Milling Co.*, 288 U.S. 212, 217-218 (1933).

ing was correct.* It also says that there was no evidence that the respondent had "palmed itself off"; or that the respondent had derived advantage from the confusion of passengers; or that, by its advertising, respondent had "enticed" American's passengers to fly North American; or that respondent had flown a single passenger who thought that he had contracted for something other than respondent's transportation (R. 417-418; *infra*, p. vi). Accordingly, "there is no demonstration that North American affirmatively acted in violation of a statute, within the jurisdiction of the Board" (R. 418; *infra*, p. vii).

Subsequent sections of the opinion leave it unclear whether findings of deliberate intent to deceive and of injury to a competitor are regarded as essential under the "public interest" language of Section 411 or are required as part of the substantive offense of "unfair or deceptive practices or unfair methods of competition."

Section II of the opinion notes that the legislative history of the Act shows that the public interest was to be the guiding consideration and that Section 411 was adapted from Section 5 of the Federal Trade Commission Act (R. 419-422; *infra* pp. vii-x). And in the first paragraph of Section III, the opinion proceeds on the public interest theme by quoting *Federal Trade Commission v. Klesner*, 280 U.S. 19 (1929), to the effect that confusion on the part of purchasers is not enough to establish a Section 5 case but that the purpose of such a proceeding "must be protection of the public." (R. 423; *infra* p. xi)

* The Board did not include this negative finding among those adopted by it.

The remainder of Section III, however, appears to be concerned primarily with the substantive content of "unfair methods of competition". It quotes the dictum from *Federal Trade Commission v. Gratz*, 253 U.S. 421, 427-428 (1920), that the statutory "words 'unfair methods of competition' . . . are clearly inapplicable to practices never heretofore regarded as . . . deception, bad faith, fraud or oppression" (R. 423; *infra* p. xi) But thereafter Section III of the opinion seems to telescope into a single concept the separate statutory points on "public interest" and "unfair or deceptive practices or unfair methods of competition", relying on *Schechter Corp. v. United States*, 295 U.S. 495, 533 (1935), and *Federal Trade Commission v. Raladam Co.*, 283 U.S. 643, 648 (1931) (R. 423-424; *infra* pp. xi-xii).

Section IV of the opinion sets forth at considerable length what it says is a "collateral discussion" (R. 428; *infra* p. xv) of numerous cases dealing with the private law of trade name infringement (R. 424-430; *infra* pp. xii-xvi) and asserts that the Board was not constituted to adjudicate such "complicated issues" (R. 429; *infra* p. xvi). Significantly the opinion adds that the court would "not say that under no circumstances can name appropriation in simulation of or in general resemblance to the name of another airline result in an unfair trade practice or an unfair method of competition, quite the contrary" (R. 429; *infra* p. xvi). To this statement there is appended a footnote citing four private name infringement cases, each of which involved fraudulent intent on the part of the defendant.* The conclusion in Section IV of the opin-

* The cases cited are: *Aetna Casualty & Surety Co. v. Aetna Auto Finance*, 123 F.2d 582, 584 (5th Cir. 1941) ("here it plainly,

ion is that the mere combination of the words "North" and "American" is not a case within the Board's "jurisdiction" (R. 429-430; *infra* p. xvi).

Finally the opinion asserts in Section V. the rule that protection of a name is beyond the scope of the Board's powers (R. 432; *infra* p. xviii). The opinion states that it is "reinforced" in this conclusion by a review of the "leading cases" of this Court dealing with Section 5 of the Federal Trade Commission Act, which it summarizes in an Appendix to the opinion. Many of these cases have no remote bearing on the instant case.* However, very significantly the *Klesner* case is summarized as follows:

"... refused enforcement where *mere confusion in competing business names* failed to establish 'specific and substantial' public interest." (R. 433; *infra* p. xix) (Emphasis added)

Also meaningful is the summary of *Federal Trade Commission v. A. P. W. Paper Co.*, 328 U.S. 193 (1946), in these terms:

appears that [the name is] . . . fraudulent and will be enjoined"); *Greyhound Corp. v. Goberna*, 428 F.2d 806, 807-808 (5th Cir. 1942) ("Choice of the name 'Greyhound' . . . was . . . fraudulent"); *Standard Oil Co. of Maine v. Standard Oil Co. of New York*, 45 F.2d 309, 312 (1st Cir. 1930) ("[The name] shows a premeditated plan . . . with but an obvious and sinister purpose in view"); *Standard Oil Co. of New Mexico v. Standard Oil Co. of Calif.*, 56 F.2d 973, 980 (10th Cir. 1932) ("It could have had but one object, namely, to improperly obtain . . . the name 'Standard Oil' and to take and commercially use as its own a commercial asset that belongs to another").

* *E.g.*, *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 39 (1948); *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470 (1952), and other cases under the Robinson-Patman Act involving issues wholly unrelated to the case at bar.

"... refused enforcement of a Commission order forbidding the use of 'Red Cross' in advertising *where there was no fraud* but where some of the public thought that goods were made in accordance with standards of, or by virtue of some connection with, the American Red Cross." (R. 434-435; *infra* p. xxi) (Emphasis added)

And *Federal Trade Commission v. Raladam Co.*, 283 U.S. 643 (1931), is summarized as follows:

"... denied enforcement of an order against a dangerously misleading obesity 'cure' where there was a failure of demonstration that advertising 'substantially injured or tended thus to injure the business of any competitor or of competitors generally'" (R. 433; *infra* p. xix)

In sum, then, the lower court held that, in a name confusion case, there is no unfair practice or unfair method of competition "over which the Board, in the public interest, has jurisdiction" (R. 430, *infra* p. xvi) unless there is shown (a) deliberate intent to deceive amounting to fraud and success in "palming off" by deception, and (b) actual injury to a competitor in the form of loss of patronage resulting from "enticement" of confused customers. Absent these factors, the court's ruling is that confusion of the public by name similarity is a matter only of private concern quite beyond the power of the Civil Aeronautics Board to remedy.

REASONS FOR GRANTING THE WRIT

1. The court below, in holding that a case of statutory unfair practice and unfair method of competition requires a showing of deliberate intent to deceive which is carried out through "palming off" by deception, is in conflict with decisions of Courts of

Appeals for the Third, Seventh and Second Circuits under Section 5 of the Federal Trade Commission Act, the substance of which is the same as that of Section 411 of the Civil Aeronautics Act. The lower court specifically ruled that it was applying its view of Section 5 of the Trade Commission Act (R. 432; *infra* p. xviii).

The Court of Appeals for the Third Circuit in the leading case of trade-name confusion under Section 5 of the Trade Commission Act, has squarely held that a "deliberate effort to deceive is not necessary, nor must the Commission find actual deception. . . ." *Pep Boys—Manny, Moe and Jack v. Federal Trade Commission*, 122 F. 2d 158, 161 (3d Cir. 1941). Similarly, the Seventh Circuit has held "that the false, unfair or deceptive acts defined in the Federal Trade Commission Act need not be such as would constitute fraud, as that term is ordinarily understood in law." *DDD Corp. v. Federal Trade Commission*, 125 F.2d 679, 682 (7th Cir. 1942). And in the Second Circuit, the failure of the Commission to "produce consumers to testify to their deception does not make the order improper, since actual deception of the public need not be shown" *Charles of the Ritz v. Federal Trade Commission*, 143 F. 2d 676, 680 (2d Cir. 1944). See also, *Gimbel Bros. v. Federal Trade Commission*, 116 F. 2d 578, 579 (2d Cir. 1941) ("a deliberate effort to deceive is not necessary").*

*Several other courts have applied the same rule in common law cases of unfair competition, especially where only equitable relief in the future is requested. *Navy Club v. All Navy Club*, 85 F. Supp. 679, 682 (D.R.I. 1949); *Household Finance Corp. v. General Finance Credit Corp.*, 49 F. Supp. 541, 542 (D.N.J. 1943); cf. *Stork Restaurant v. Sahafi*, 166 F.2d 348, 359 (9th Cir. 1948).

In short, in these three circuits the controlling consideration is the probability that the public may be misled, not a showing of deliberate intent to deceive amounting to fraud—and not a showing of palming off by deception in the conventional sense of common law unfair competition.

The lower court establishes contrary doctrine for the District of Columbia Circuit by a revival of an old dictum in *Federal Trade Commission v. Gratz*, 253 U.S. 421, 427-428 (1920), to the effect that the statutory unfair method of competition is limited to cases of fraud, deception, and bad faith in business ethics as understood prior to 1914 (R. 423; *infra* p. xi). It has been thought by some students, Handler, *Unfair Competition and the Federal Trade Commission*, 8 Geo. Wash. L. Rev. 399, 404 (1940), and by some judges, see *Koch v. Federal Trade Commission*, 206 F. 2d 311, 319 (6th Cir. 1953); cf. *Charles of the Ritz v. Federal Trade Commission*, 143 F. 2d 676, 680 (2d Cir. 1944), that this dictum had been interred by this Court through Mr. Justice Cardozo in *Federal Trade Commission v. Algoma Co.*, 291 U.S. 67, 81 (1934), where it was said that competition may fall within the statutory ban though it “does not amount to fraud as understood in courts of law”, and through Mr. Justice Stone in *Federal Trade Commission v. Keppel & Bro.*, 291 U.S. 304, 309 (1934), where the Court expressly rejected the argument that a showing of fraud or accomplished deception is a prerequisite to a finding of an unfair method of competition.

However, never expressly overruled, the *Gratz* dictum lives again in the District of Columbia and

seriously confuses the law.* Review by this Court is clearly indicated.

2. The lower court has introduced another anachronistic rule into the law of statutory unfair practices and unfair methods of competition. It held that a showing of injury to a competitor is required to establish a violation of the statute.

Other circuits have taken a contrary position and conflict exists. Faced with the argument "that the order should be set aside because no competitor was hurt by the practices", the Seventh Circuit rejected the contention as "hardly worthy of serious or extended consideration." *Eugene Dietzgen Co. v. Federal Trade Commission*, 142 F.2d 321, 327 (7th Cir. 1944). The rule in the Third Circuit is the same. *Pep Boys—Manny, Moe and Jack v. Federal Trade Commission*, 122 F.2d 158, 161 (3d Cir. 1941).

The lower court has reintroduced the rationale of *Federal Trade Commission v. Raladam Co.*, 283 U.S. 643 (1931), which first established the rule that competitive injury was essential under Section 5 of the Federal Trade Commission Act as that Act was worded prior to 1938. But Congress supposedly legislated that decision out of the law by the Wheeler-Lea Amend-

* For signs of confusion elsewhere, see *New American Library v. Federal Trade Commission*, 213 F.2d 143 (2d Cir. 1954), where one judge would have reversed the Commission's order on the ground that no violation of the statute is shown unless there is evidence of actual deception of customers (213 F.2d at 145, n. 2). His authority was *Ohio Leather Co. v. Federal Trade Commission*, 45 F.2d 39, 41 (6th Cir. 1930), a case decided on the authority of the *Gratz* opinion. Compare *Hillman Periodicals v. Federal Trade Commission*, 174 F.2d 122 (2d Cir. 1949).

ment to the Trade Commission Act in 1938.* The Wheeler-Lea Amendment and the Civil Aeronautics Act were enacted almost simultaneously, and the substance of the former was included in the language of Section 411 of the latter.**

But in the present case the lower court not only cites and relies on the *Raladam* case, and summarizes it in the appendix to the opinion as though it remained in full force (see the court's summary quoted *supra* pp. 17-18), but makes a point of emphasizing, as grounds for its decision, the absence of a showing of injury to the competitor, the petitioner here (R. 418; see discussion *supra* p. 14). This notable resurrection of the *Raladam* case is accomplished by reasoning that an order to cease and desist under Section 411 of the Civil Aeronautics Act must be in the public interest, and concluding that if the respondent had not succeeded in taking business from its competitor the public had not been harmed—ignoring the fact that the public was put to expense, annoyance, and delay by going to the wrong ticket counter, telephoning the wrong carrier, meeting the wrong flights, and suffering the many other confusing impositions specifically disclosed by the Board's findings.

This requirement of a specific showing that competitive injury has been accomplished, in order to dem-

* See Beer, *Federal Trade Law and Practice* 79 (1942). The legislative history singled out the *Raladam* ruling and explicitly indicated that it was being overturned. S. Rep. No. 221, 75th Cong. 1st Sess., p. 2 (1937).

** The prohibition in Section 411 of "unfair or deceptive practices" follows the same pattern as the new language added to Section 5 of the Trade Commission Act in 1938 which outlawed "unfair or deceptive acts or practices."

onstrate that there is a "public interest" in the proceeding, defeats the plain purpose of the Wheeler-Lea Amendment, incorporated in Section 411 of the Civil Aeronautics Act. Review by this Court is called for.

3. Having revived the *Gratz* dictum and the *Raladam* ruling, the court below proceeds to apply the third landmark opinion that was issued during a period in which, according to many critics,* this Court was excessively severe in overturning Trade Commission orders. This third opinion is *Federal Trade Commission v. Klesner*, 280 U.S. 19 (1929).

In the *Klesner* case the facts disclosed that in 1915 the respondent, as a matter of spite, opened a small store in Washington, D. C., and used the name employed by his former lessee who thereafter became his competitor, with whom he had a wide range of disputes. By the time the Commission entered its order some seven years later in 1922, a private suit by the complaining party, requesting an injunction against the former lessor's use of his trade name, had previously been dismissed in 1920, and this Court emphasized that the notoriety of the petty and spiteful dispute extending over a period of several years had dispelled any public confusion that might have initially existed in the small area where the two stores operated. 280 U.S. at 29. Thus the matter had become a triviality, and the Commission's order would settle only a vendetta in which no public interest remained. In this setting, the Supreme Court reversed the Commission's order, "not on the merits, but upon the ground that

* Blaisdell, *The Federal Trade Commission* 74 (1932); Watkins, *Appraisal of the Work of the Federal Trade Commission*, 32 Col. L. Rev. 272 (1932).

the filing of the complaint before the Commission was not in the public interest.” 280 U.S. at 24.

Nonetheless there are some passages in the *Klesner* opinion which, taken out of context, might suggest that this Court meant that customer confusion in name similarity cases, however widespread, could not be a basis for Commission action under Section 5 of the Trade Commission Act. And it was exactly this interpretation which the lower court gave to the case. The opinion below quotes from the case (R. 422-423, *infra* pp. x-xi) and summarizes it as one which “refused enforcement where mere confusion in competing business names failed to establish ‘specific and substantial’ public interest” (R. 433; *infra* p. xix; see discussion *supra* p. 15). After the lower court had noted that the instant case likewise involves only public confusion resulting from competing business names, it held that—absent fraudulent intent to deceive and palming off by deception—the Board has no “jurisdiction” of such a case (R. 430; *infra* p. xvi).

This ruling that the Board has no “jurisdiction” over name confusion cases conflicts with law developed under the Trade Commission Act.*

* *Cf. Galter v. Federal Trade Commission*, 186 F.2d 810 (7th Cir. 1951), *cert. denied*, 342 U.S. 818 (1951); *Pep Boys—Manny, Moe and Jack v. Federal Trade Commission*, 122 F.2d 158 (3d Cir. 1941); *Federal Trade Commission v. Real Products Corp.*, 90 F.2d 617 (2d Cir. 1937). Moreover, the suggestion in the opinion below (R. 429, *infra* p. xvi) that Congress has no legislative power in this area of trade-name confusion is erroneous, see *S. C. Johnson & Son v. Johnson*, 175 F.2d 176, 178 (2d Cir. 1949), and clearly conflicts with, and therefore casts doubt on, the incontestability clause in Section 15 of the Lanham Trade-mark Act, 60 Stat. 433 (1946), 15 U.S.C. § 1065.

The lower court, in applying the *Klesner* decision to deny Board jurisdiction, not only ignores the facts in the *Klesner* case, as well as the most significant passages in this Court's opinion, but also conflicts sharply with the interpretation of the same case held by Judge Learned Hand:

"*Klesner* . . . did indeed decide that the public interest in the controversy was a justiciable issue The dispute concerned the use of a trademark which the respondent *Klesner* had adopted out of spite against its owner, *Sammons*; and the discussion left it not altogether clear why the public had no interest in its settlement. One might perhaps infer that if the only interest at stake is that customers shall get goods from the seller of whom they supposed they are buying, it is not enough . . . but it seems clear from what the court has said later that this is not so [citing the *Royal Milling* and the *Algonquin* cases] It would seem, therefore, that *Federal Trade Commission v. Klesner* . . . is to be put down as deciding that the court may consider whether the controversy is not in general too trivial to justify the attention of the Commission. If so, it is doubtful whether today the same answer would be given." *Mortrench Corp. v. Federal Trade Commission*, 127 F.2d 792, 795 (1942).

Judge Hand's view of what the *Klesner* case held is that generally entertained. *Handler, Unfair Competition and the Federal Trade Commission*, 8 Geo. Wash. L. Rev. 399, 404 (1940). That view would not outlaw, as not in the public interest, an order to cease and desist from a practice affecting the public extensively in its air travel between Los Angeles and New York.

This Court alone can dispel the confusion as to the meaning of the *Klesner* case and its present vitality.

if any. As Judge Hand says, it may well be that the public interest issue would not now be regarded as justiciable, or at least not to the extent which this Court apparently determined in 1929. And even if the case remains vital for purposes of Section 5 of the Trade Commission Act, there is a serious question whether it should be applied at all—or if so, how far—in judicial review of administrative action in the context of a special regulatory statute such as the Civil Aeronautics Act, where the agency is charged with a peculiar responsibility and expertise with respect to the practices of a particular industry.

Mr. Justice Frankfurter has recently noted* that the significance of judicial review of Section 5 Trade Commission orders is highlighted “by the dissimilar treatment of comparable standards entrusted to the enforcement of the Interstate Commerce Commission.” Although the outer limits of “unfair or deceptive practices or unfair methods of competition” may be determined by the courts, the findings of the Civil Aeronautics Board in a statutory unfair practice case in the highly specialized field of air transportation are entitled to considerably more weight than similar findings in an ordinary Trade Commission case. See *Universal Camera Corp. v. Labor Bd.*, 340 U.S. 474, 488 (1951). And the scope of judicial review of the Board’s determination to institute a Section 411 proceeding in the “public interest” should be even more limited. Compare this Court’s recent observation that judicial review of the decision of the General Counsel to institute an “unfair labor practice” proceeding before the National Labor Relations

* *Federal Trade Commission v. Motion Picture Adv. Co.*, 344 U.S. 392, 404 (1953) (dissenting opinion).

Board is limited to determine whether there was "abuse of discretion." *Radio Officers v. Labor Board*, 347 U.S. 17, 53 (1954).

Clarification by this Court of the present application of the *Klesner* case is urgently needed.

4. The paramount importance of the questions presented can hardly be denied. This is the first case ever to reach the courts involving Section 411 of the Civil Aeronautics Act. That section can be of great importance in the regulation of the practices of a large, rapidly expanding, and highly competitive industry. In 1938, when the Act was passed, air transportation was conducted only by some sixteen trunk lines, many of them very small, and with direct competition on but a handful of segments. Since the war, however, the domestic trunklines have grown to great size, directly competing throughout the nation—with as many as five trunk carriers competing between the same pairs of points. In addition there are some thirteen local service lines, many of which are larger than some of the trunk carriers in 1938. Further there are over fifty large irregular or non-scheduled carriers, three all-cargo carriers, several helicopter lines, and literally innumerable small non-scheduled lines and air "taxi" operators. Furthermore numerous new air carrier operations have appeared in the Territories. And internationally there has been similar expansion, with the carriers of nearly every important nation outside the iron curtain operating to these shores, whereas before the war there were only two or three, and with our own international services having multiplied from practically only one to many. To all of these services, with their keen and vigorous competition, and to the vast public they are serving, Section 411^b will be of the greatest significance unless it is emasculated.

It is now recorded history that the Trade Commission, for more than a decade, was nearly stopped in its tracks in attempting to enforce Section 5 of its basic Act outlawing unfair methods of competition. This was accomplished principally by three opinions of this Court in the *Gratz*, *Raladam* and *Klesner* cases, the very opinions taken as gospel by the lower court. As outlined by Professor Handler:

"The story of the judicial frustration of the Commission's efforts to set a plane of competition at a decent level has been . . . frequently told. . . . In the famous *Gratz* case . . . the Court in its oft-quoted dictum limited the authority of the Commission to (a) restraints of trade, (b) monopoly, and (c) practices which prior to 1914 had been regarded as deceptive, fraudulent or oppressive

"The *Gratz* case was not the only blow. . . . In . . . *Klesner* the Supreme Court arrogated to itself the determination of whether proceedings by the Commission were in the public interest, and in doing so, gave jurisdictional effect to directional language of the statute. In . . . *Raladam* . . . the power of the Commission . . . was limited to the cases where injury is sustained by an honest competitor. . . .

"Recent years have witnessed a marked improvement . . . and much of the mischief wrought by the earlier unsympathetic and hostile rulings has been and is being undone. . . .

* * *

"There have been significant doctrinal changes. The *ratio decidendi* of the *Gratz* case has in effect been overruled by *Federal Trade Commission v. Keppel*. The *Raladam* case was overturned by the Wheeler-Lea Amendments. The *Klesner* case still retains its vitality, but its principal effect has been to exclude from the Commission's jurisdiction minor peccadillos." *Unfair Competition and the Federal Trade Commission*, 8 Geo. Wash. L. Rev. 399, 400-402, 404 (1940).

It is most disturbing that, in the first judicial interpretation of Section 411 of the Civil Aeronautics Act, it should receive the same frosty reception and rigid construction which for years stymied enforcement of the companion statutory provision in Section 5 of the Trade Commission Act. This comment seems particularly apt in the instant case where—unlike the early Trade Commission cases—the Board and the Examiner both wrote illuminating opinions and made elaborate findings as to the difficulties and impositions caused the public by the name confusion in question.

The opinion below could well side-track Section 411 of the Civil Aeronautics Act much more effectively than *Gratz*, *Raladam* and *Klesner* impeded Section 5 of the Trade Commission Act. Section 411 of the Civil Aeronautics Act is of relatively less concern to the Civil Aeronautics Board, with its many other regulatory duties, than is Section 5 to the Trade Commission. It does not have the same incentive, as had the Trade Commission during its long, uphill struggle, to resist such undue judicial restriction.

The effect of the decision below, moreover, extends beyond the air transportation industry. As we have seen, the court below specifically held that, in construing Section 411 of the Civil Aeronautics Act, it was applying its views of Section 5 of the Trade Commission Act, thus reaffirming in the District of Columbia Circuit a set of rules which one would have thought completely discredited if not forgotten.

The decision will likewise be an important precedent in dealing with other statutory provisions prohibiting "unfair" practices in specialized fields. For example, an almost identical twin of Section 411 of the Civil Aeronautics Act may be found in Section

337 of the Tariff Act.* It is designed to prevent "unfair methods of competition and unfair acts in the importation of articles into the United States", and authorizes the Tariff Commission to institute a proceeding "on complaint under oath or upon its own initiative."

Other statutory provisions in this area include Section 202 of the Packers and Stockyards Act which makes it "unlawful for any packer . . . to (a) engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in commerce."** Finally, the Trade Commission has jurisdiction under Section 14 of the Webb Export Act to prohibit "unfair methods of competition used in export trade."***

It is vitally important that the District of Columbia Circuit, having special responsibilities in the field of administrative law, should be brought into harmony with other Circuits and have the guidance of this Court on the present application of some of its old and rather musty precedents.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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* 46 Stat. 703 (1930), 19 U.S.C.A. § 1337.

** 42 Stat. 161 (1921), as amended, 49 Stat. 649 (1935), 7 U.S.C.A. § 192(a).

*** 40 Stat. 507 (1918), 15 U.S.C.A. § 64.

APPENDIX

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 12041

NORTH AMERICAN AIRLINES, INC., PETITIONER

v.

**CIVIL AERONAUTICS BOARD, RESPONDENT
AMERICAN AIRLINES, INC., INTERVENOR**

**On Petition for Review of Order of the
Civil Aeronautics Board**

Decided June 23, 1955

Mr. Hardy K. Maclay, with whom *Mr. Walter D. Hansen* was on the brief, for petitioner.

Mr. Gerald F. Krassa, Attorney, Civil Aeronautics Board, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of Court, with whom *Messrs. Emory T. Nunneley, Jr.*, General Counsel, Civil Aeronautics Board, *John H. Wanner*, Associate General Counsel, Civil Aeronautics Board, and *James L. Highsaw, Jr.*, Chief, Litigation and Research Division, Civil Aeronautics Board, were on the brief, for respondent. *Messrs. O. D. Ozment*, Attorney, Civil Aeronautics Board, and *Charles H. Weston*, Attorney, Department of Justice, also entered appearances for respondent.

Mr. Howard C. Westwood, with whom *Messrs. John W. Douglas* and *Jerome Ackerman* were on the brief, for intervenor.

Before PRETTYMAN, FAHY and DANAHER, Circuit Judges.

DANAHER, *Circuit Judge*: Petitioner asks review of a Board order which denied petitioner's application for authority to engage in air transportation under the name North American Airlines, Inc., and which further ordered the petitioner, "its successors, assignees, representatives,

agents, officers and employees . . . to cease and desist from engaging in air transportation under the names North American Airlines, Inc., North American Airlines, North American, or any combination of the word 'American.'

Petitioner, holder of Letter of Registration No. 528 issued to Twentieth Century Airlines, Inc., July 22, 1947, is an irregular air carrier engaged in air transportation primarily between New York, Chicago, Kansas City and Los Angeles. About May 21, 1951, petitioner commenced operations under the trade names of North American Airlines and North American, and on March 3, 1952, petitioner changed its corporate name to North American Airlines, Inc. By letter dated March 11, 1952, petitioner advised the Board of its change of name and sought reissue of its Letter of Registration accordingly. Without then acting upon petitioner's application, the Board on August 19, 1952 amended its regulations to provide that on and after November 15, 1952 an irregular carrier might hold out to the public and perform air transportation services only in the name appearing in its Letter of Registration.

The Board's introductory comment to its new Economic Regulations, § 291.28 pointed out that where good will had been established in a name by use thereof, the Board would deny permission to continue such name only in cases where it believed that a violation of § 411 of the Act¹ might be involved and where such fact had been established after notice and opportunity for a hearing. On October 6, 1952 petitioner, pursuant to the new regulation, applied to the Board for authorization to conduct its operations under its corporate name rather than as Twentieth Century Airlines, Inc. In support of its application, petitioner set out that it had invested "substantial" sums of money in the name North American

¹ 49 U.S.C. § 491 (1952), which reads in part as follows:

"The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof."

Airlines and had established "substantial" good will in that name at a time when there was no Board regulation of the names of air carriers.

American Airlines, Inc., was allowed to intervene in opposition to petitioner's application, representing, principally, that the name "North American" infringed upon the established name of American and constituted unfair competition within the meaning of § 411 of the Act, and further urging that North American had no vested right or established good will in the name "North American" which the Board was bound to recognize. Thereupon the Board ordered an investigation to determine whether petitioner's engaging in air transportation under the names North American Airlines, Inc., North American Airlines, or North American was in violation of § 411 and, if so, whether the Board should issue a cease and desist order accordingly, and this investigation was consolidated for hearing and decision with North American's application.

The Board found (1) that American Airlines and North American Airlines are in competition in air transportation; (2) that American Airlines was incorporated, *eo nomine*, and that the term "American" had acquired a secondary meaning before North American adopted the trade name of, and changed its corporate name to, North American Airlines; (3) that the substantial public confusion found herein was likely to continue; (4) that use of the name "North American Airlines, Inc.," "North American Airlines," "North American" or any combination of the word "American" constitutes an unfair or deceptive practice and an unfair method of competition within the meaning of § 411 of the Act; (5) that the public interest required denial of the application for authority to engage in air transportation under the name North American Airlines, Inc.; and (6) that petitioner and its successors, assignees, representatives, agents, officers and employees should be ordered to cease and desist from engaging in air transportation under the names listed in (4), above.

Thereupon, the Board, one member dissenting, entered its order, drastic, as it knew,² and unprecedented, so far

² "We are well aware that an order requiring respondent to cease and desist using the name under which it has been engaging in air transportation is a serious sanction which necessarily involves disturbance and loss to the carrier. We do not impose such a measure lightly. But the record is convincing that the public

as we have been shown. It purported to predicate public interest upon the "confusion,"³ attributable to North American's "knowing" use of a "confusingly similar name" to that of American. Its brief tells us that there were "six groups of confused members of the public; namely: (1) ticket holding passengers, (2) persons meeting passengers, (3) persons making inquiry regarding transportation, (4) persons having business with petitioner [North American], (5) the Post Office, and (6) the public press." Our examination of the record and the exhibits discloses, (1) some North American passengers with North American tickets in their hands presented themselves at American ticket counters; (2) some people intending to meet North American passengers called American Airlines "information" or ticket counters to ask about the arrival of North American flights; (3) some people who heard North American radio advertising of deferred payment flight plans called American Airlines for particulars as to how North American's "fly now—pay later" program operated; American offered no such plan; (4) "persons having business" were (a) a

interest requires this action in order to prevent further public confusion between respondent and intervenor due to similarity of names. The maintenance of high standards in dealing with the public is expected of common carriers, and the public has a right to be free of the inconveniences which flow from confusion between carriers engaging in the transportation of persons by air. The speed of air travel may well be diminished when passengers check in for flights with the wrong carrier, or attempt to retrieve baggage from the wrong carrier, or attempt to purchase transportation from the wrong carrier, or direct their inquiries to the wrong carrier. Friends, relatives or business associates planning to meet passengers or seeking information on delayed arrivals are subject to annoyance or worse when confused as to the carrier involved. The proper handling of complaints from members of the public is impeded by confusion as to the carrier to whom the complaint should be presented. The transportation itself may differ from what the confused purchaser has anticipated (e.g., in terms of equipment), even though the time and place of arrival may be about the same. It is obvious that public confusion between air carriers operating between the same cities is adverse to the public interest, and we have determined that the public should be protected from the effects of the confusion shown on the record by eliminating what we find to be the cause of such confusion."

³ See note 2, *supra*.

painter's union official who telephoned to American to protest that a sign was being painted by non-union painters but was assured this was a North American sign; (b) a hotel in Kansas City where North American had "hotelled" its passengers sent its bill to American; (c) a radio repair service telephoned to American about a North American bill for \$13; (d) a tailor who addressed a North American tailoring charge for \$18 to American although the street number was that of North American; (5) the Post Office misdelivered to American (a) one correctly addressed envelope intended for North American; (b) the tailor bill mentioned in (4)(d) above; (c) in Burbank where both lines had ticket counters at the terminal, a witness said some 6 to 12 envelopes came to the American counter but were intended for the North American counter; (6) a robbery of a North American ticket office was described in the newspapers as having occurred at American's office.

The Board offered no evidence whatever. We have already noted the nature and the gist of such evidence as was offered which was supplied by employees of the intervenor, American, and upon such the Board rested its finding of "confusion." Board Member Adams in his dissent commented:

"Since American Airlines, Inc., carries approximately 5½ million passengers each year over its system, I am not impressed with the fact that witnesses in this case (principally those employed by American Airlines itself) have testified that some confusion has existed. . . . On the contrary, I would be greatly surprised, (in view of the several million phone calls and other communications which American Airlines receives every year over and above those received from passengers which it actually carries) if there were not some demonstrable public confusion"

The Board also concluded that the word "American," as used by the intervenor, had acquired a secondary meaning, that intervenor had long engaged in extensive advertising of its services under that name, and that this "practice has helped to instill in the minds of the public the notion that the word 'American' when used in connection with domestic air transportation denotes American

Airlines." In this particular it did not "overlook" "the recent use of the word American in the name of the sectional local service carrier All American Airways," the "recent use of the word American in the name of the irregular carrier Air America," and the international "use of American in the name Pan American World Airways." In this connection it should be noted that American Airlines, Inc., since 1934, and its predecessor American Airways, Inc., since 1930, had continuously been engaged in air transportation. In 1949 American Airlines, Inc., registered in the Patent Office as a service mark the two words in combination, "American Airlines."⁴

No ticket agents were parties to the proceeding, nor was there evidence as to their engaging in proscribed practices within the meaning of the Act, but they as a class throughout the nation, have been brought within the sweep of the Board's order.

The Board rejected, and decided it "need not comment" upon, its Examiner's finding:

"There is no evidence of record that North American adopted its name with intent to deceive the public or trade upon the good-will and business reputation of American, or that American has been injured by such operation"

Our examination of the record demonstrates that the Examiner was correct. Nor is there evidence that North American palmed itself off as American; that North American "confused" American's passengers to the former's advantage; that North American's advertising was intended to or did entice American's passengers to fly North American, indeed it is difficult to assume that North American's advertising could be of the slightest advantage unless it could bring passengers to North American, rather than American. Nor is there evidence that North American flew a single passenger who paid its lower rate in the thought that he contracted for anything but North American's non-scheduled transportation.

⁴ Even were we to assume that such registration is here significant, the likelihood of consumer confusion is still the test of secondary meaning. *Charles D. Briddell, Inc. v. Alglobe Trading Corp.*, 194 F. 2d 416, 421 (2d Cir. 1952).

or that American was harmed otherwise than by the competition afforded by any irregular carrier. In short, the public may have benefited, so far as the record shows, and in any event, there is no demonstration that North American affirmatively acted in violation of a statute within the jurisdiction of the Board.

Except as just noted, the Board adopted, almost *in toto*, the findings of the Examiner, and we quote once more:

"There is no question but what American has acquired during the past 20 years through its constant efforts a good-will in its use of the name 'American' or 'American Airlines,' which has become a valuable asset to be protected. However, an action for infringement of American's trade name can find its remedy in the courts. Section 411 was not designed for the purpose of protecting the private rights of an individual carrier except to the extent of regulating competition between the various air carriers to assure fair competition and thereby maintain a sound economic transportation system; also, equally important, the Board was given the responsibility of safeguarding the public interest against unfair and deceptive methods of competition."

The Examiner came almost to the heart of the problem: his error, like that of the Board, stems from the application of criteria which fell short of the public interest findings demanded by the law.

II

"The Civil Aeronautics Act was enacted at a critical stage in the air transport industry, struggling to survive in the face of excessive competition and a number of other adverse factors. The Act was designed to bring out of chaos a system of regulated competition and the encouragement and promotion of civil aviation, not only in the interests of commerce but also in the interests of national defense." *United Air Lines v. Civil Aeronautics Board*, 198 F. 2d 100, 105 (7th Cir. 1952). "It is also clear that the purpose of the Act is not primarily to advance the private interests of carriers, but the public interest in an adequate air transport system." *Id.* at 107.

And see *Civil Aeronautics Board v. State Airlines*, 338 U.S. 572, 578 (1950).

The Act was the culmination of years of groping. By 1937 it became clear that Congress was determined to formulate an over-all policy for the regulation of air transportation. Senator Harry S. Truman, as chairman of a subcommittee of the Senate Committee on Interstate Commerce opened hearings on S. 2 and S. 1760. Representatives of the Air Line Pilots Association denounced the practices of an air line which had been "cheating the pilots out of some measure of the pay which was rightly theirs by means of juggling the seniority of their pilots" and of another air line which "was deliberately flying its pilots far in excess of the maximum flying hours permitted. . . .". By such means, it was charged, some bidders for air mail contracts were gaining advantages over others. The Solicitor of the Post Office Department testified that in the past many of the mail contracts had been held or controlled by holding companies and banking interests. Some air lines, he said, had been affiliated with manufacturers from whom they were required to purchase their equipment and to pay prices fixed by the manufacturing companies. There had been interlocking boards of directors, and many if not most of the lines had been dominated by other than practical air line operators. At one time three holding companies had controlled 92 per cent of the air mail contracts then in

⁵ Section 2 of the Act, 49 U.S.C. § 402 (1952), in pertinent part reads:

"In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest . . .

"(a) The encouragement and development of an air-transportation system properly adapted to the present needs of the . . . domestic commerce of the United States. . . .

"(c) The promotion of adequate, economical and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices.

"(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the . . . domestic commerce of the United States. . . ."

existence. Some air mail contractors had invaded the territory of others with competitive "off-line" service. When two competitors had submitted bids for the same mail contract the company awarded the contract was bought out by its competitor. Without more than these few cursory references to various situations described to the Senate committee, enough has been said to suggest that sharp conflict and acrimonious exchanges alerted the Congress to the need for action. The spokesman for the leading air lines testified, in part, that "... contrary to the condition in any other form of transportation, the Government of the United States is, and for a long time will be, the largest single customer of the air carriers, and in particular cases, among the smaller lines, this patronage on the part of the Government may exceed the total patronage of all other customers."⁶

One cannot study the testimony at the hearings without an abiding feeling that the "public interest" concept engrossed or even dominated all concerned. Large outlays of public funds were to be required to aid in promoting the healthy growth of the air transportation industry. Special provisions were written into the legislation to deal with specific and demonstrated past abuses.⁷ Encouragement of competition had a definite place in the declaration of policy, just as the Board "in the interest of the public," not in furtherance of the private interests of one entity as against another, was empowered to deal with unfair practices or unfair methods of competition.

Undoubtedly the draftsmen realized that many situations would arise which could not with particularity be spelled out in the proposed counterpart of § 411.⁸ It

⁶ *Hearings before United States Senate Subcommittee of the Committee on Interstate Commerce on S. 2 and S. 1760, 75th Cong., 1st Sess.* 454 (1937).

⁷ See, generally, for the business regulative features, §§ 408-416 of the Act, 49 U.S.C. §§ 488-496 (1952). (As additional background, see *Two Decades—Federal Aero-Regulation in Perspective*, 12 *Journal of Air Law and Commerce* 105 (1941).

⁸ Cf. the court's summary of the Board's argument in *Hawaiian Airlines v. Trans-Pacific Airlines*, 78 F. Supp. 1, 5 (D. Hawaii 1948).

considered the advice of Commissioner Eastman.⁹ "Now, these two bills you have before you follow the usual pattern of regulatory bills. And you will find that much of the language is similar to language which is now already in the law with reference to railroads or with reference to motor carriers. *That, I think, is a desirable thing, because when language has been interpreted once it is desirable to have it used again, thus avoiding many questions always arising with respect to the employment of new language.*" (Emphasis supplied.) He continued that the pending section "with respect to unfair methods of competition is, I believe, substantially a duplicate of the provisions under the Federal Trade Commission Act, by which the Commission is empowered to prevent unfair methods of competition in ordinary industrial enterprises. I have not studied the decisions of the Federal Trade Commission enough so that I have any clear idea of how far the question of unfair methods of competition may go; and that is another matter I should like to go further into. But I see no reason, if kept within proper limits, why that provision is objectionable."¹⁰

Thus it adapted to meet prospective needs § 5 of the Federal Trade Commission Act¹¹ and with it, the body of law which had grown up around it. Senator Truman told the Senate, and all parties here concede, that § 411 was so modeled, and we will therefore look to the decisions construing that section to discern the allowable limits for our action.

III

"Section 5 of the Federal Trade Commission Act does not provide private persons with an administrative remedy for private wrongs." *Federal Trade Comm'n v. Klesner*, 280 U.S. 19, 25 (1929). "In determining whether a proposed proceeding will be in the public interest the Commission exercises a broad discretion. But the mere fact that it is to the interest of the community that private rights shall be respected is not enough to support a

⁹ Chairman of the Legislative Committee of the Interstate Commerce Commission testifying, *Hearings, supra* note 6, at 70.

¹⁰ *Id.* at 74.

¹¹ 15 U.S.C. § 45 (1952).

finding of public interest. To justify filing a complaint the public interest must be specific and substantial." *Id.* at 28. See also, *Federal Trade Comm'n v. Milling Co.*, 288 U.S. 212, 217 (1933): "This requirement is not satisfied by proof that there has been misapprehension and confusion on the part of purchasers, or even that they had been deceived,—the evidence commonly adduced by the plaintiff in 'passing off' cases in order to establish the alleged private wrong. . . . But to justify the Commission in filing a complaint under § 5, the purpose must be protection of the public." *Federal Trade Comm'n v. Klesner, supra* at 27.

"The words 'unfair method of competition' are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade." *Federal Trade Comm'n v. Gratz*, 253 U.S. 421, 427-8 (1920).¹²

What may be "unfair methods of competition" will not admit of precise definition and "are thus to be determined in particular instances, upon evidence, in the light of particular competitive conditions and of what is found to be a specific and substantial public interest." *Schechter Corp. v. United States*, 295 U.S. 495, 533 (1935). Protection of the public interest is made of paramount importance, *Federal Trade Comm'n v. Raladam Co.*, 283 U.S. 643, 648 (1931), and even if the Board finds the existence of some unfair method of competition, it "still may not proceed unless it further appear that a proceed-

¹² For other instances of practices found to constitute unfair methods of competition, see *Federal Trade Comm'n v. Milling Co.*, 288 U.S. 212, 217 (1933); *Federal Trade Comm'n v. Keppel & Bro.*, 291 U.S. 304, 310 *et seq.* (1934); *Federal Trade Comm'n v. Cement Institute*, 333 U.S. 683, 690, 691 (1948), and cases cited; cf. *Federal Trade Comm'n v. Bunte Bros.*, 312 U.S. 349, 354 (1941).

ing would be to the interest of the public, and that such interest is specific and substantial." *Id.* at 649.¹³

The principles thus enunciated lose none of their force because of the 1938 amendment to § 5 of the Federal Trade Commission Act, indeed they are emphasized in their applicability to the consumer rather than merely to the merchant or the manufacturer. See *Federal Trade Comm'n. v. A. P. W. Paper Co.*, 328 U.S. 193, 199 n.4 (1946). In the light of such teaching, therefore, we must approach our present problem. We have found no case with a reach such as is here sought to be applied, indeed it would appear there has been no previous Board decision in which the Board has so sweepingly extended its sway.¹⁴

IV

If this were a private suit in which American had charged North American with a trade-mark infringement and unfair competition, we would be bound to weigh considerations differing from the public interest criteria which must govern our opinion. Myriad cases in the first named categories have compelled the notice of the courts; as may be demonstrated by reference to a few recent decisions.¹⁵ "For our purpose, cases brought in the federal

¹³ It would seem that the function of the Board like that of the Commission in situations such as this has limitations; certainly under the guise of prohibiting unfair or deceptive practices or unfair methods of competition, it may not impose a code of fair competition upon an industry. Cf. *Schechter Corp. v. United States*, 295 U.S. 495, 531-533 (1935); *New American Library v. Federal Trade Comm'n*, 213 F. 2d 143 (2d Cir. 1954).

¹⁴ See note 2, *supra*.

¹⁵ *Hyde Park Clothes v. Hyde Park Fashions*, 204 F. 2d 223 (2d Cir. 1953), *cert. denied*, 346 U.S. 827 (1953); *Charles D. Briddell, Inc. v. Alglobe Trading Corp.*, 194 F. 2d 416 (2d Cir. 1952); *Admiral Corp. v. Penco, Inc.*, 203 F. 2d 517 (2d Cir. 1953); *S. C. Johnson & Son, Inc. v. Johnson*, 116 F. 2d 427 (2d Cir. 1940); *Q-Tips, Inc. v. Johnson & Johnson*, 206 F. 2d 114 (3d Cir. 1953), *cert. denied*, 346 U.S. 867 (1953); *Radio Shack Corp. v. Radio Shack*, 180 F. 2d 200 (7th Cir. 1950); *Best & Co. v. Miller*, 167 F. 2d 374 (2d Cir. 1948); *McGraw-Hill Pub. Co. v. American Aviation Associates*, 73 App. D.C. 131, 117 F. 2d 293 (D.C. Cir. 1940); *Mastercrafters Clock Co. v. Vocheron Watches, Inc.*, 105 U.S.P.Q. 160, — F. 2d — (2d Cir. 1955); *G. B. Kent & Sons v. P. Lorillard Co.*, 114 F. Supp. 621 (S.D.N.Y. 1953), *aff'd*, 210 F. 2d 953 (2d Cir. 1954).

courts in the field of unfair competition (not including Federal Trade Commission cases) may be divided into six categories . . . " said the court in *Philco Corporation v. Phillips Mfg. Co.*, 133 F.2d 663, 666 (7th Cir. 1943), and fruitful reference may be made to the analysis found at pages 666-667. Developments in this field are also discussed at interesting and valued length by Judge Frank, concurring, in *Standard Brands v. Smidler*, 151 F. 2d 34, 37 (2d Cir. 1945). He observes, *Id.* at 38 n.2, "The trade-name monopolies arising under the Federal Trade Commission Act are in a different category." If this were a private suit, whether American's registration of "American Airlines" as a service mark gives it anything more than a procedural advantage, *Armstrong Co. v. Nu-Enamel Corp.*, 305 U.S. 315, 324 (1938), whether the Lanham Act, 15 U.S.C. §§ 1051-1127 (1952), confers a new federal right against unfair competition, *Charles D. Briddell, Inc. v. Alglobe Trading Corp.*, 194 F. 2d 416, 421 (2d Cir. 1952), or whether the mere likelihood of confusion of the public as between the goods and services of the parties will predicate relief, may become important or even controlling factors after test by appropriate defenses.

But we are not here concerned with the possibility that American might prevail in private litigation, and nothing we say is intended to bear one way or the other upon issues which might develop in such an action. The Board in its brief tells us that "Petitioner's name is differentiated from intervenor's only by the addition of a one-syllable prefix." It cites cases accordingly. *Material M. M. Ass'n v. New York M.M.M. Ass'n*, 169 App. Div. 843, 155 N.Y.S. 706, 710 (1st Dept. 1915); *American Thread Co. v. North American Thread Co.*, 33 F. Supp. 616 (S.D.N.Y. 1935); *Speed Products Co. v. Timmerman Products*, 179 F. 2d 778, 780 (2d Cir. 1949); *American Home Benefit Ass'n v. United American Benefit Ass'n*, 63 Idaho 754, 125 P. 2d 1010 (1942); *Northern Metal Co. v. Maier*, 337 Pa. 257, 11 A. 2d 140 (1940); *Navy Club v. All-Navy Club*, 85 F. Supp. 679, 682 (D.R.I. 1949). But were we to say that private injury criteria must govern the issue here, we would also be bound to observe that these and offsetting cases point up clearly that there is no inflexible rule and the circumstances in each situation must be considered. See, e.g., *McGraw-Hill Pub. Co. v. American Aviation Associates*, 73 App. D.C. 131, 117 F.

2d 293 (D.C. Cir. 1940) ("American Aviation" and "Aviation"); *Pure Oil Co. v. The Pep Boys*, 76 U.S. App. D.C. 19, 128 F. 2d 34 (D.C. Cir. 1942); *Eastern Wine Corp. v. Winslow Warren, Ltd.*, 137 F. 2d 955, 956 (2d Cir. 1943), *cert. denied*, 320 U.S. 758 (1943) ("Chateau Martin" and "Chateau Montay"); *Fawcett Publications v. Bronze Publications*, 173 F. 2d 778 (5th Cir. 1949), *cert. denied*, 338 U.S. 869 (1949) ("True Confessions" and "Bronze Confessions"); *Coca-Cola Co. v. Snow Crest Beverages*, 162 F. 2d 280 (1st Cir. 1947), *cert. denied*, 332 U.S. 809 (1947) ("Coca-Cola" and "Polar Cola").

Even in the last named cases the test could be said to be whether the addition of a prefix or an extra nominate term renders the corporate name "so distinct that confusion is unlikely." *Pure Oil Co. v. The Pep Boys*, *supra* at 19.

Perhaps the injection of one additional idea will suffice to show how murky are the waters in which the Board would fish. In *Columbia Mill Company v. Alcorn*, 150 U.S. 460, 466 (1893), the Court said: "The appellant was no more entitled to the exclusive use of the word 'Columbia' as a trade-mark than he would have been to the use of the word 'America,' or 'United States,' or 'Minnesota,' or 'Minneapolis.' These merely geographical names cannot be appropriated and made the subject of an exclusive property." Cf. *Durable Toy & Novelty Corporation v. J. Chein & Co.*, 133 F. 2d 853, 855 (2d Cir. 1943), *cert. denied*, 320 U.S. 211 (1943), where Judge Learned Hand pointed out that "... 'Uncle Sam' is part of the national mythology, not entirely unlike the flag, or any other part of our inherited patriotic paraphernalia; all have a measurable interest in its use"; *Patent Paint Co. v. Sunset Paint Co.*, 53 App. D.C. 348, 351, 290 Fed. 323 (D.C. Cir. 1923), where this court considered Sun as *publici juris*. Congress "has been given no power to legislate upon the substantive law of trade-marks," and it reasonably may be assumed that "the intention was to allow the registration of such marks as that law, and the general law of unfair competition of which it is a part, recognized as legitimate." *American Foundries v. Robertson*, 269 U.S. 372, 381 (1926). The Court continued at 383, "There may be, of course, instances where a single word in the corporate name has become so iden-

tified with the particular corporation that whenever used it designates to the mind of the public that particular corporation. But it is not here shown that, standing alone, the word 'Simplex' has that effect; that it is any more calculated to denote to the public the defendant corporation than any of the other corporations in the names of which it is likewise embodied; or, indeed, that it signifies the appropriation of some corporate name though incapable of exact identification."

There are many instances, of which the public must be presumed to have knowledge, of similarities in airlines designation indicating a not uncommon practice of this sort in the air transportation industry. Exhibits in the record here disclose airlines routes allocated by the Board to All American Airways, Inc., American Airlines, Inc., Northeast Airlines, Inc., Eastern Air Lines, Inc., Northwest Airlines, Inc. and Western Airlines, Inc. Pan American and Air American were previously mentioned.¹⁶ Phonetic differences, lack of emphasis in petitioner's use of the disputed term, possible failure of the intervenor's advertising campaigns, differences in service, rates and the elements of the airlines traveling public each has sought to reach, would seem to serve here to distinguish the two competing companies. Were we to continue this collateral discussion we might observe with the court in *Eastern Wine Corp. v. Winslow Warren, Ltd.*, 137 F. 2d 955, 960 (2d Cir. 1943), *cert. denied*, 320 U.S. 758 (1943): "The issue in such a case as this is 'whether an appreciable number of prospective purchasers of the goods * * * are likely' to be confused. That a few particularly undiscerning prospective purchasers might be misled is not enough.'" Even in such adversary litigation between competitors, the obligation resting upon one is not to insure that every purchaser will distinguish it from its competitor, but only to use "reasonable means to prevent confusion." *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111, 121 (1938). "A new competitor is not held to the obligations of an insurer against all possible confu-

¹⁶ Exhibits in the Congressional hearings, *supra*, note 6, disclose air mail contractors such as North American Aviation, Inc., American Airlines, Inc., Northwest Airlines, Inc., Western Air Express Corp., Transcontinental and Western Air, Inc., National Park Airways, Inc. and National Air Transport.

sion. He is not obligated to protect the negligent and inattentive purchaser from confusion resulting from indifference. *Skinner Mfg. Co. v. General Foods Sales Co., Inc.*, D.C., 52 F. Supp. 432, 433, 450. It has been said that he is not required to make the market "foolproof" [Citing cases]. * * * Instead, they are required only to mark or designate them in such manner that purchasers exercising ordinary care to discover whose products they are buying will know the truth and not become confused or mistaken. * * * *Life Savers Corp. v. Curtiss Candy Co.*, 182 F. 2d 2, 8 (7th Cir. 1950). See also, *McGraw-Hill Pub. Co. v. American Aviation Associates*, 73 App. D.C. 131, 117 F. 2d 293 (D.C. Cir. 1940).

Against the foregoing background, perhaps already too extensively portrayed, one thing seems crystal clear: that if Congress has "been given no power to legislate upon the substantive law of trade-marks" it is utterly unlikely that Congress constituted the Board a forum to adjudicate the complicated issues arising in this field. We will not say that under no circumstances can name appropriation in simulation of or in general resemblance to the name of another air line result in an unfair trade practice or an unfair method of competition, quite the contrary.¹⁷ But the mere combination of the words "North" and "American," the latter so commonly used in business enterprises, even in the airlines industry, without more—much more than is disclosed upon this record—is not the unfair practice or the unfair method of competition over which the Board, in the public interest, has jurisdiction. Our duty is to "make certain that the legislative enactment is within Constitutional limitations, that the executive program is within statutory limitations, and that a disputed executive action is within the terms of the legislative mandate, fairly based on facts fairly found, and not arbitrary, capricious, or fanciful."¹⁸ *United Air Lines v. Civil Aeronautics Board*, 81 U.S. App. D.C. 89, 91, 155 F. 2d 169 (D.C. Cir. 1946).

¹⁷ See, e.g., *Aetna Casualty & Surety Co. v. Aetna Auto Finance*, 123 F. 2d 582, 584 (5th Cir. 1941), cert. denied, 315 U.S. 824 (1942), and cases cited; *Greyhound Corporation v. Choberna*, 128 F. 2d 806 (5th Cir. 1942); *Standard Oil Co. of Maine v. Standard Oil Co. of New York*, 45 F. 2d 309 (1st Cir. 1930); *Standard Oil Co. of New Mexico v. Standard Oil Co. of Cal.*, 56 F. 2d 973, 977 (10th Cir. 1932), and cases cited in note 1.

V

What Congress in the public interest sought to reach in its original § 411 of the Act may be illustrated by what was said of the recent amendment extending the provision to "ticket agents."¹⁸ Types of practices and abuses were carefully spelled out,¹⁹ each of the sort for which a public body might be expected to provide a remedy in the public interest where resort by an individual

¹⁸ Act of July 14, 1952, 49 U.S.C. § 491 (1952).

¹⁹ House Rep. No. 2420, 82d Cong., 2d Sess. (1952), reads in part:

"The necessity for the proposed legislation is occasioned by the fact that a number of ticket agents have engaged in flagrant abuses and deceptions in the sale of air transportation to the great detriment of the public. For example, ticket agents have engaged in such practices as the following:

"(1) Deceptive advertising and other public representations which induce the public to believe that the agent is an air carrier and to rely on such agent to provide the air transportation service offered when in fact the agent is not authorized to engage in air transportation but is depending upon the performance of the service by some authorized air carrier undisclosed to the prospective passenger and in many instances unknown to the agent at the time the representation is made or the same is consummated.

"(2) Deceptive and misleading advertising and other public representation as to the quality and kind of service, cost, type and size of aircraft, times of departure and arrival, points served, route to be flown, stops to be made, and total trip time from point of departure to designation.

"(3) Offer and sale of air transportation without regard to the rates, fares, and charges specified in the tariffs of air carriers represented, discriminating between passengers, charging some more and some less than lawful tariff rates, demanding and collecting extra improper charges which in some instances are exacted to make up the difference between the lower rate offered purposely as a 'come-on' to bring the prospective purchaser to the agent's place of business and the correct rate which should have been advertised to the public.

"(4) Selling air transportation on a reservation basis when the agent has no binding commitment with any air carrier to provide the service. In such instances the passenger is later informed that the flight will be delayed, or he finds upon arrival at the airport that there is no space for him, or that there is no flight as represented. The passenger then must wait until the agent finally arranges for this passage on another flight or another carrier, which may be hours or days later and may be at a higher fare or under

to the courts would largely be fruitless or impracticable. As the Federal Trade Commission Act's § 5 had been made the model, so, too, in the Civil Aeronautics Act, § 411 was a novelty. It was a "new device" introduced by Congress "in the hope thereby of remedying conditions in business which a great majority of the American people regarded as menacing the general welfare, and which for more than a generation they had vainly attempted to remedy by the ordinary processes of law. It was believed that widespread and growing concentration in industry and commerce restrained trade and that monopolies were acquiring increasing control of business." Mr. Justice Brandeis, dissenting, in *Federal Trade Comm'n v. Gratz*, 253 U.S. 421, 432 (1920). It would seem that without more, protection by the Board of a name monopoly, employing the vast force of the United States in its support, is far outside the scope of the powers entrusted to the Board. Especially do we so conclude upon reconsideration of the Act's pertinent policy declarations, set forth in note 2, *supra*.

We are reinforced in our conviction by a review of the leading cases²⁰ in which the Supreme Court has clearly taught the nature and the substance of the public interest to be considered and the criteria to be applied in proceedings under the Federal Trade Commission Act. Since that body of law likewise surrounds the bare bones of § 411 of the Act before us, we must be guided accordingly. Given an order in a case which falls within the standards of illegality thus connoted, with adequate explanation of the reasons why the public interest demands

less desirable circumstances or on less desirable types of aircraft than that represented at the time of sale.

(5) Falsely representing that passengers are directly insured in large amounts when in fact no such insurance is in force.

(6) Falsely representing that special "priorities" for reservations and special discounts are available, particularly for persons in military service when in fact no such special considerations are available.

(7) Failure and refusal to make proper refunds when flights are not available or only partially completed.

These practices arose with the development of the irregular air carrier operations after the close of World War II and have become more widespread and serious each year.

²⁰ See appendix.

such an order, and a determination based upon adequate supporting evidence that the respondent has engaged in the conduct to be condemned, we will sustain the Board. This is not such a case, and when as a matter of law we so conclude, it is our duty to set aside the Board's order. We do so.

Reversed.

APPENDIX

The following succinct summary of some of the leading cases referred to in note 20 of the opinion may prove of convenience to counsel.

Federal Trade Comm'n v. Gratz, 253 U.S. 421, 425 (1920), affirmed a court of appeals decision holding that the Commission "has no jurisdiction to determine the merits of specific individual grievances."

Federal Trade Comm'n v. Beech-Nut Co., 257 U.S. 441 (1922), enforced a Commission order against a resale price maintenance scheme which suppressed competition and obstructed a free flow of commerce.

Federal Trade Comm'n v. Winsted Co., 258 U.S. 483 (1922), enforced a Commission order where goods, falsely branded as "Natural Merino" or otherwise as wool in fact were largely cotton.

Federal Trade Comm'n v. Eastman Co., 274 U.S. 619 (1927), held that the Board had no power to order the Company to divest itself of physical property acquired prior to Commission action even though the property acquired and held was in furtherance of a scheme of unfair competition. At page 623 the Court said: "The Commission exercises only the administrative function delegated to it by the Act, not judicial powers. [Citing cases.] It has not been delegated the authority of a court of equity."

Federal Trade Comm'n v. Klesner, 280 U.S. 49 (1929), refused enforcement where mere confusion in competing business names failed to establish "specific and substantial" public interest.

Federal Trade Comm'n v. Raladam Co., 283 U.S. 643, 652-653 (1931), denied enforcement of an order against a dangerously misleading obesity "cure" where there was a failure of demonstration that advertising "substantially

injured or tended thus to injure the business of any competitor or of competitors generally. . . . Compare *Federal Trade Comm'n v. Raladam Co.*, 346 U.S. 149 (1942).

• *Federal Trade Comm'n v. Milling Co.*, 288 U.S. 212 (1933), enforced an order against respondents who called themselves milling companies but ground no grain, thus deceiving the public.

Federal Trade Comm'n v. Algoma Co., 291 U.S. 67 (1934), enforced a Commission order against some fifty manufacturers with widespread market who resorted to use of a trade name "California White Pine" upon a much inferior and cheaper species of pine, resulting in complete misrepresentation of the thing supplied.

Federal Trade Comm'n v. Keppel & Bro., 291 U.S. 204 (1934), enforced an order against unlawful competition by many manufacturers of candy who enticed children to buy through resort to a sales scheme which included a chance of their getting their money back.

Federal Trade Comm'n v. Education Society, 302 U.S. 112 (1937), enforced a Commission order against false representations, inter alia, that books were free where many teachers and others testified to being deceived and deluded.

Federal Trade Comm'n v. Bunte Bros., 312 U.S. 349 (1941), refused an order against an intra-state candy sale scheme, like that in the *Keppel* case, but referred to examples of unfair competition, "which run the gamut from bribing employees of prospective customers to selling below cost for hindering competition." 312 U.S. at 354 n. 4.

Fashion Guild v. Federal Trade Comm'n, 312 U.S. 457 (1941), held that purposes and practices contrary to the Sherman Act and the Clayton Act were within the Commission's jurisdiction where one hundred seventy six manufacturers and thousands of retailers combined to restrain competition, especially where an organized boycott of non-conforming competitors had a tendency to create monopoly.

Siegel Co. v. Federal Trade Comm'n, 327 U.S. 608 (1946), outlined the problem presented upon judicial review where the Commission had failed to consider or make findings as to whether a trade name, Alpacuna, could be saved.

Federal Trade Comm'n v. A. P. W. Paper Co., 328 U.S. 493 (1946), refused enforcement of a Commission order forbidding the use of "Red Cross" in advertising where there was no fraud but where some of the public thought that goods were made in accordance with standards of, or by virtue of some connection with, the American Red Cross. (And see p. 199 and note 4 concerning the effect of the 1938 amendment to the Federal Trade Commission Act.)

Price differential problems under the Robinson-Patman Act, *Federal Trade Comm'n v. Morton Salt Co.*, 334 U.S. 37 (1948); *Federal Trade Comm'n v. Ruberoid Co.*, 343 U.S. 470 (1952); *Federal Trade Comm'n v. Minneapolis-Honeywell Co.*, 344 U.S. 206 (1952), where Commission orders were sustained, may be compared with those in *Standard Oil Co. v. Federal Trade Comm'n*, 340 U.S. 231 (1951), and *Automatic Canteen Co. v. Federal Trade Comm'n*, 346 U.S. 61 (1953), where enforcement was refused. Exclusive contracts as restraint of competition and possessing a tendency to monopoly were considered in *Federal Trade Comm'n v. Motion Picture Adv. Co.*, 344 U.S. 392 (1953), and comparable questions in yet other cases we need not cite.

Filed June 23, 1955 Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,041

April Term 1955

NORTH AMERICAN AIRLINES, INC., *Petitioner*,

v.

CIVIL AERONAUTICS BOARD, *Respondent*,

AMERICAN AIRLINES, INC., *Intervenor*.

On Petition for Review of Order of the Civil
Aeronautics Board

Before: Prettyman, Fahy and Danaher, Circuit Judges

Judgment and Decree

This case came on to be heard on the record from the Civil Aeronautics Board, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is adjudged and decreed by this Court that the order of the Civil Aeronautics Board on review in this case be, and the same is hereby, reversed and set aside, and that this case be, and it is hereby, remanded to the said Civil Aeronautics Board for further proceedings not inconsistent with the opinion of this Court.

Dated: June 23, 1955

Per Circuit Judge Danaher

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1955

AMERICAN AIRLINES, INC., *Petitioner*,

NORTH AMERICAN AIRLINES, INC., *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 410

AMERICAN AIRLINES, INC., *Petitioner*,

v.

NORTH AMERICAN AIRLINES, INC., *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF PETITIONER

The respondent's brief in opposition advances two points.

Respondent's first point is that the lower court correctly determined that the Civil Aeronautics Board "was without jurisdiction" of this matter. In the discussion of this point, respondent frequently suggests by indirection that the court below reviewed the raw record and overturned the Board's findings of fact—

a suggestion completely at odds with the opinion. Nowhere in the opinion does it purport to reverse the Board's factual findings of widespread public confusion, inconvenience and annoyance caused by the similar trade names of two competing airlines.

Phrasing the argument in terms of lack of "jurisdiction" is confusing. Respondent's contention actually is that the Board's findings of fact fell short, as a matter of law, of disclosing an "unfair or deceptive practice or unfair method of competition" within the meaning of Section 411 of the Civil Aeronautics Act. The asserted shortcomings in the findings are set forth in respondent's brief in almost the identical language used by the lower court:

" . . . there was no evidence that respondent adopted its name with intent to deceive the public or trade upon the goodwill or business reputation of petitioner or that petitioner had been injured by respondent's operation; that respondent palmed itself off as petitioner; . . . that respondent's advertising intended to or did entice petitioner's passengers to fly on respondent" (Resp. Br., pp. 4-5; compare the lower court's opinion, App. to Pet., p. vi.)

It is the absence of these factors which led the lower court to invalidate the Board's order. It reached this conclusion by combining *Gratz*, *Raladam* and *Klesner* into a rule of law that public confusion from similar trade names cannot ground a section 411 order in the absence of fraud, intent to deceive or injury to a competitor. This, as the petition shows, is squarely in conflict with the rules established in other Circuits and misapplies this Court's own decisions.

That the lower court constructed such a rule of law is made clearer by respondent's own brief. That brief seeks to explain why the Board's order was held invalid by reference to some of the practices which occasioned amendment of section 411 to include ticket agents, practices which involved conventional fraud or deception. Resp. Br., pp. 5-7. That, says the respondent, is the lower court's "yardstick". *Id.*, p. 6. Such, indeed, is our point: the lower court's "yardstick" is precisely the rule of *Gratz*, which would require fraud or deliberate deception in the traditional sense.

The respondent also seems to argue that trade-name simulation cases inherently involve private rights rather than public interest, and that consequently the "court below" was clearly correct in holding that the Board has no jurisdiction over cases involving private rights in the field of trade marks." (Resp. Br., p. 9). The fact that this case involves the use of a trade-name, rather than some other form of advertising, cannot lessen the public's interest in being freed of confusion.

A private interest there may be also. In fact, this very respondent is a party to litigation decided, after this petition was filed, by the Court of Appeals for the Ninth Circuit wherein it was held that the use of the name North American Airlines was a deliberate infringement of the name of North American Aviation, Inc., an aircraft manufacturer, in violation of private rights established by the law of California. *North American Aircoach Systems, Inc., et al. v. North American Aviation, Inc.*, 107 U.S.P.Q. 68 (9th Cir., Sept. 28, 1955); petition for rehearing filed October 28, 1955.¹

¹ That decision does not moot this case—as is demonstrated by the respondent's failure to mention the decision. There the *deceit* reaches only the use of the term "North American" and not other

But private interests may be variously limited in terms of geographical extent, lack of injury, or otherwise—as in fact, this very respondent argues in its petition for rehearing in the Ninth Circuit. Whatever the scope of private interests under the common law of unfair competition or trade name infringement, section 411 of the Civil Aeronautics Act gives a carrier the right to bring before the Board an alleged unfair practice involving the use of a trade name—like any other advertising that may impose upon customers—and have that agency determine the matter from the standpoint of the public's interest. And where, as here, the agency, after full hearing, ~~extensive~~ review of the evidence, and elaborate findings, has found the public harmed, put to expense, and suffering all the annoyances and inconveniences disclosed by this record, it is contrary to the rules of other Circuits and the proper interpretation of this Court's own precedents for the Court of the District of Columbia Circuit to hold that the public can be protected only within the narrow circumscription of the discredited judicial views which, in the 1920's, imposed the *Gratz* dictum upon the Trade Commission Act.

Respectfully submitted,

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November 3, 1955.

combinations which would cause confusion with American Airlines; it does not involve the important questions under Section 411 of the Civil Aeronautics Act involved here; and it is still pending on rehearing.

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No. 110.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1955

AMERICAN AIRLINES, Inc., *Petitioner*,

v.

NORTH AMERICAN AIRLINES, Inc., *Respondent*.

ON WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1955

No. 410

AMERICAN AIRLINES, INC., *Petitioner,*

v.

NORTH AMERICAN AIRLINES, INC., *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit, not yet reported, appears at pages 411-435 of the Record. The opinion of the Civil Aeronautics Board, together with those findings of its Examiner as were specifically adopted by the Board, appears at pages 199-229 of the Record, and the full Initial Decision of the Examiner appears at pages 183-199 of the Record.

JURISDICTION

The judgment of the Court of Appeals was entered on June 23, 1955 (R. 437). The petition for writ of certiorari was filed on September 21, 1955, and was granted on November 14, 1955. The jurisdiction of this Court is based on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Under Section 411 of the Civil Aeronautics Act (49 U.S.C. § 491), the Civil Aeronautics Board "may, . . . if it determines that such action by it would be in the interest of the public, investigate and determine whether any air carrier . . . has been or is engaged in unfair or deceptive practices or unfair methods of competition." If, after notice and hearing, the Board finds that the carrier is engaged therein the Board shall order the carrier "to cease and desist from such practices or methods of competition." Here, in a Section 411 proceeding, the Board ordered the respondent "to cease and desist from engaging in air transportation under the name North American . . . or any other name which includes the word American." The order was based on substantial evidence and findings disclosing that respondent's recently adopted name of "North American Airlines" is confusingly similar to petitioner's long-established and well-known name of "American Airlines" and that respondent's use of such name causes the public serious and widespread confusion and inconvenience by checking in with the wrong carrier, attempting to purchase transportation from the wrong carrier, meeting flights of the wrong carrier, and otherwise. The questions presented are:

1. Did the findings of widespread and serious public confusion from the use of a similar name

fall short of showing "unfair or deceptive practices or unfair methods of competition", and is it essential to such a showing that it be found that respondent was guilty of fraudulent intent to deceive or of palming off and had injured a competitor?

2. When reached after full and fair hearing and argument, with the factors affecting the public explicitly weighed in a considered agency opinion fully supported by the officer who heard the evidence, is the Board's determination that this proceeding is "in the interest of the public," in that its object is to correct and avoid wasteful and harmful inconvenience to passengers and prospective passengers in the operation of air carrier service, open to veto by a court where the administrative action is taken by an agency especially charged by Congress with responsibility for protecting the public interest in air transportation?

STATUTE INVOLVED

Section 411 of the Civil Aeronautics Act, 52 Stat. 1003 (1938), as amended 66 Stat. 628 (1952), 49 U.S.C. § 491, reads as follows:

"The [Civil Aeronautics] Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive

practices or unfair methods of competition, it shall order such air carrier, foreign air carrier or ticket agent to cease and desist from such practices or methods of competition."

Pertinent excerpts from the similar Section 5 of the Federal Trade Commission Act are printed in the margin.¹

STATEMENT

The petitioner American Airlines, Inc. (hereinafter "American") and the respondent North American Airlines, Inc. (hereinafter "North American") are competing airlines (R. 171, 220). American is a scheduled airline operating pursuant to certificates of

¹ "Sec. 5, (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

"The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

"(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue . . . a complaint stating its charges If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this act, it shall make a report in writing and shall issue an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice." 38 Stat. 719 (1914), as amended, 52 Stat. 111 (1938), 52 Stat. 1028 (1938); 64 Stat. 21 (1950), 66 Stat. 632 (1952), 15 U.S.C. § 45.

public convenience and necessity issued under Section 401 of the Civil Aeronautics Act (49 U.S.C. § 481), and it provides both low cost air coach or air tourist service and first class service (R. 172, 232, 240). North American is a large irregular airline operating air coach service (Exh. AA-10; R. 175, 181) pursuant to a letter of registration issued under Section 416 of the Civil Aeronautics Act (49 U.S.C. § 496) (R. 171, 220).²

American and North American compete between New York, Chicago and Los Angeles (R. 220); one of the most heavily travelled air routes in the nation. Both carriers operate frequent and daily transcontinental air coach service (R. 104-105, 172, 277).³ In Los Angeles they operate from different airports. North American operates from the Burbank airport (R. 104) where its transcontinental service has been quite substantial (R. 104-105). American maintains a ticket office at the Burbank airport (R. 41) but its planes operate from the Inglewood (*i.e.*, the International) airport (Exh. AA-4; R. 103, 157).

North American also operates between New York and Miami (R. 117); American does not serve Miami (Exh. AA-5; R. 103, 160).

The petitioner was incorporated in 1934 under its present name, and ever since has engaged in extensive air carrier service under the name of American Airlines (R. 220). Its predecessor operated under the

² Section 416 empowers the Board to exempt air carriers from any requirement of Title IV of the Act. The Board has exempted carriers operating irregular service from the requirement of a certificate of convenience and necessity in Section 401 of that Title. Such carriers operating large transport craft are styled large irregular carriers. They are issued letters of registration as evidence of their exemptions.

name American Airways beginning in 1930 and continuing up to the incorporation of the petitioner (R. 220). In 1949 petitioner registered the words "American Airlines" on the Patent Office's Principal Register as a service mark used in air transportation.³ In the words of respondent's counsel, American Airlines is "considered, I think, by a great part of the travel-

³ This mark now has the protection afforded by the incontestability provision in Section 15 of the Lanham Trade-Mark Act, 60 Stat. 433 (1946), 15 U.S.C. § 1065. This Act, which vastly expanded the federal protection afforded to registered marks, did not become effective until July 5, 1947, and the processing of applications was at first slow. Petitioner's application for registration was filed July 27, 1948 and was granted on August 23, 1949. (Exh. AA-3; R. 147-148, 171). Immediately after registration, Section 33(a) of the Act, 15 U.S.C. § 1115(a), makes the registration certificate "prima facie evidence of registrant's exclusive right" to the mark and thereby puts the burden of proof on the one who is denying the validity of the mark, even though all "legal or equitable defenses" are not foreclosed during the first five years. That was the situation here at the time of the hearing before the Examiner in March 1953. But the five year period of continuous use after registration required by Section 15 has now expired, and public documents at the Patent Office indicate that petitioner on January 14, 1955, complied with the necessary filing requirements of Sections 8 and 15 of the Act which bring the incontestability provision into effect. Section 33(b) of the Act, 15 U.S.C. § 1115(b), provides that where, as here, a mark has become incontestable under Section 15, the certificate of registration "shall be conclusive evidence of the registrant's exclusive right to use the registered mark". Accordingly, since it could never even be suggested that the name "American Airlines" was registered fraudulently or is otherwise defective as set forth in the provisos to Section 33(b), in a judicial proceeding any contention that the mark "American Airlines" is invalid, or is "merely a geographical" term and does not have a secondary meaning referring to petitioner, would be precluded as a matter of law.

ing public the top airline, the best known airline, in the United States" (R. 83).

The respondent is a North Carolina corporation, but its principal office is at Los Angeles, California (R. 1). The respondent applied to the Civil Aeronautics Board for, and was issued on July 22, 1947, a letter of registration in the name of Twentieth Century Airlines, Inc., which was then respondent's corporate name (R. 3-4).

Without making any effort to change its name in the letter of registration and without notifying the Board, respondent on April 21, 1951, began offering air transportation services to the public under the fictitious name of North American Airlines (R. 220, 308-309). In accordance with a California law,⁴ respondent on May 21, 1951, filed in the Office of the Clerk of the County of Los Angeles a certificate of conducting business under this fictitious name (R. 1), but it was almost a year later, on March 3, 1952, when its articles of incorporation were amended so as to change its name to North American Airlines, Inc. (R. 1, 309). Thereafter, respondent sent the Board a letter dated March 11, 1952, advising of the change in corporate name and suggesting reissue of the letter of registration in the new name (R. 173).

On August 19, 1952, the Board adopted its Business Name Regulation. The validity of this regulation is not here in question. In substance, it provides that an air carrier,⁹ in dealing with the public and in perform-

⁴ Cal. Civ. Code § 2466. This law was designed to prohibit fly-by-night debtors from escaping their lawful obligations. Cf. Bank & Trust Co. v. Gearhart, 45 Cal. App. 421, 423, 187 Pac. 989, 990 (1st Dist. 1920).

ing air transportation services, must secure permission of the Board to use any name different from the name in its operating authority.⁵

In the preamble of the regulation, the Board observed that, until the relatively recent past, "most carriers were in fact doing business under their official name without any compulsion to do so" (R. 295). The Board noted that there had been an "increasing tendency, particularly among some of the large irregular carriers, to use names different from those in which operating authority is granted by the Board", a practice which the Board found had "resulted in confusion in the minds of the public, an increase in the administrative burden of the Board, and greater difficulty in achieving adequate enforcement of the Act and the regulations" (R. 295). The Board announced, however, that where a different name had already been used by a carrier to build up good will, such name would be barred only if its use were found after notice and hearing to contravene Section 411 of the Civil Aeronautics Act (R. 297).⁶

⁵ The section of this regulation here involved appears as Part 291.28 of the Board's Economic Regulations (14 C.F.R. § 291.28), and is printed in the Record at pages 295-298. Several regulations, substantively identical, were adopted simultaneously, each regulation being applicable to a different type of carrier in accordance with the different types of operating authority. Thus, one regulation applies to carriers holding certificates of convenience and necessity (14 C.F.R. § 202.8), whereas another regulation governs large irregular carriers holding letters of registration (14 C.F.R. § 291.28).

⁶ The full text of this preamble to the regulation appears at pages 295-297 of the Record. The preamble was omitted when the regulation was compiled into the Code of Federal Regulations, 14 C.F.R. § 291.28.

On October 6, 1952, pursuant to this regulation, respondent applied to the Board for permission to use the name North American Airlines, Inc. (R. 1), and the proceeding on such application was assigned Docket No. 5774 (R. 3). The petitioner objected to the grant of the application and filed a memorandum of complaint alleging that the use of the name North American Airlines caused public confusion between respondent and petitioner and constituted an unfair or deceptive practice or unfair method of competition in violation of Section 411 of the Civil Aeronautics Act; the petitioner also submitted supporting affidavits (R. 5).

The Board considered the petitioner's complaint and concluded that it raised "important issues of fact and law which can be decided only after a hearing" (R. 5). Accordingly, on January 28, 1953, the Board issued an order directing the commencement of a proceeding to determine whether "North American has been and is engaging in activities and practices in violation of Section 411 of the Act, and if any such violation is established, whether the Board should issue an order directing North American to cease and desist from such violations" (R. 6). This proceeding was assigned Docket No. 5928. In this same order, the Board consolidated the Section 411 proceeding with the proceeding in Docket No. 5774 on respondent's application to change its official name, and both proceedings were set for hearing before one Examiner (R. 6). In another order, the petitioner was permitted to intervene and become a party to support the allegations in its complaint to the Board (R. 6-7).

The Board also provided that, pending final decision in the proceeding, respondent's continued use of the

North American name would not constitute a violation of the Business Name Regulation (R. 5). It is clear that the only issues in the proceeding were those arising under Section 411 of the Act (R. 209 n. 10).

At the ensuing hearing, both the petitioner (R. 221) and the respondent (R. 223) introduced evidence. Sixteen witnesses testified and numerous exhibits were received in evidence (R. iii-x). Likewise traffic surveys, carrier reports, schedules, and other statistical and documentary material were incorporated in the record by reference pursuant to stipulation (R. 172). The Board's Enforcement Attorney appeared (R. 7) and actively participated throughout the proceeding including its briefing and argument, although he did not sponsor any witnesses or exhibits.

After receiving briefs the Examiner issued an exhaustive Initial Decision finding that respondent's use and advertising of the name North American violated Section 411 of the Act (R. 184-199). Accordingly, the Examiner recommended that an order be entered requiring respondent "to cease and desist doing business in air transportation under the name North American Airlines, Inc. or any variation of the name 'American'" (R. 199).

The respondent filed exceptions with the Board, and after the normal procedure of briefing and oral argument (R. 200), the Board issued its opinion (R. 199-229). It specifically adopted (R. 201) and set forth in an appendix (R. 219-229) numerous of the findings made by the Examiner, and the Board made additional findings and conclusions of its own.

On the evidence the Board found that the public confused the respondent with the petitioner because of

the respondent's use of the names North American and North American Airlines and their similarity to the names American and American Airlines (R. 201-204). This confusion existed not only among passengers and persons inquiring for flight information, but even among merchants and creditors (R. 201-202)—though “The bulk of the confusion shown in the record was on the part of persons reasonably identified as prospective or actual purchasers of air transportation” (R. 202).

The Board further found that there was no doubt that the petitioner's long use and extensive advertising of the name American and American Airlines, and the common reference to the petitioner by the newspapers as American, had created a public understanding that, as used in connection with domestic air services, the words American and American Airlines signify the petitioner (R. 206-207, 220-221, 227).

Likewise, the Board squarely rejected the respondent's contention that the confusion was not “substantial or widespread” (R. 204-205). While the Board found it unnecessary to endorse the Examiner's numerical estimate that the instances of confusion in the Los Angeles area alone amounted to some 200 a week, its analysis of the evidence showed that the confusion was, indeed, substantial in amount and was not *de minimis* as the respondent had contended (R. 205-206); the evidence of confusion at both Los Angeles and New York was “abundant” (R. 201).

The nature of this widespread confusion was found by the Examiner, in findings adopted by the Board, as follows:

“The above evidence generally involved numerous inquiries on the part of the public made to

American employees concerning service, rates, routes, and schedules of North American under the mistaken impression that North American and American were one and the same airline.

"An officer of American testified that he had received from employees under his supervision numerous inquiries indicating confusion between American Airlines and North American Airlines, and that * * * his office had received a telephone call from a representative of a trade union, complaining that an American sign was being painted by non-union painters, and upon investigation it was found that the sign was that of North American. There were instances of air passengers holding North American tickets attempting to check in for North American flights at American ticket counters—in fact, at the Burbank office this was a daily occurrence—and many of the passengers were still confused after an explanation had been made that American and North American were two different airlines. There were instances where North American passengers attempted to claim their baggage at the American counter; also other instances where prospective passengers insisted they were entitled to a discount for transportation on American because they held a 'Buyers League Scrip Book.' Upon an investigation by the passengers making the inquiries, it was learned that it was North American instead of American which offered a discount.

"There were other instances of persons meeting incoming North American passengers who made inquiries at the American ticket counter at Burbank to determine time of arrival. Other inquiries were made of American agents at Los Angeles concerning an \$80 fare from Los Angeles to New York, which the persons had heard advertised on television, and upon investigation it

was found that it was North American they were referring to, and not American. One witness testified that she had heard people state that they were under the impression that North American and American were the same or affiliated companies. Another witness for American testified that one person insisted that American flew from New York to Miami because she had heard a radio program to that effect, whereas the program in question was that of North American. There were instances where mail addressed to North American was delivered to American Airlines' office. Tradesmen have dunned American for bills owed by North American and hotels have requested American's advice as to billing for hotel charges incurred by North American crews. A witness for American stated that at its Burbank office the president of North American, who is on duty at the North American ticket counter at Lockheed air terminal, informed her that many persons would stop at his counter and request tickets to Dallas, Oklahoma City, or Tulsa, points which North American did not serve, and he would realize that the passengers were confused and that they were under the impression it was American's ticket counter. *The president further stated to the witness that if the passengers were destined to New York or Chicago he would do everything he could to 'steal' them.*

"There were many other instances similar to those referred to above that need not be repeated here. In general, they indicate that certain confusion exists on the part of the public in distinguishing the services of the two airlines in question." (R. 221-223) (Emphasis added).

Finally the Board found:

"... the record is convincing that the public interest requires this action in order to prevent

further public confusion between respondent and intervenor due to similarity of names. The maintenance of high standards in dealing with the public is expected of common carriers, and the public has a right to be free of the inconveniences which flow from confusion between carriers engaging in the transportation of persons by air. The speed of air travel may well be diminished when passengers check in for flights with the wrong carrier, or attempt to purchase transportation from the wrong carrier, or direct their inquiries to the wrong carrier. Friends, relatives or business associates planning to meet passengers or seeking information on delayed arrivals are subject to annoyance or worse when confused as to the carrier involved. The proper handling of complaints from members of the public is impeded by confusion as to the carrier to whom the complaint should be presented. The transportation itself may differ from what the confused purchaser had anticipated (e.g., in terms of equipment), even though the time and place of arrival may be about the same. It is obvious that public confusion between air carriers operating between the same cities is adverse to the public interest, and we have determined that the public should be protected from the effects of the confusion shown on the record by eliminating what we find to be the cause of such confusion." (R. 208-209)

The Board concluded, as had its Examiner, that the respondent's use of the name "North American Airlines," "North American" or any combination of the word "American" constitutes an unfair or deceptive practice and an unfair method of competition (R. 210-211). Accordingly, it determined that the respondent and its agents should be ordered to cease and desist from engaging in air transportation under such names

(R. 211), and an appropriate order was entered (R. 229-230).

The respondent duly petitioned the lower court to review the Board's order. The petitioner intervened (R. 311).

The issues on the appeal were precisely defined by prehearing stipulation approved by the court (R. 306-311). They were limited to the following:

1. Did any combination of the Board's findings "establish a violation of Section 411, because of the use by the [respondent] of the name North American Airlines, Inc., North American Airlines or North American"?
2. Did the Board's findings "establish a secondary meaning connoting American Airlines, Inc., in the words 'American' and 'American Airlines' "?
3. Did the Board find that the respondent's use of the North American name was fraudulent?

The only other issues set forth in the agreed statement related to whether various of the findings as to the existence of confusion, its probability, etc., were supported by substantial evidence.⁷

The lower court had the case under consideration for just over a year. It did not agree with the respondent's

⁷ It will be observed that on the petition for review no issue was tendered bearing on the scope of the Board's order or its appropriateness as a means for remedying the Section 411 violation if such a violation were properly found to exist. Hence this case does not present the problem dealt with in *Jacob Siegel Co. v. Federal Trade Commission*, 327 U.S. 608, 613 (1946), as to whether some alternative form of order should have been entered.

attack on the findings of fact. Indeed, it quoted some of the findings and paraphrased others, and referred in summary to a part of the evidence (R. 413-416, 418). Rather it found that the Board erred in "the application of criteria which fell short of the public interest findings demanded by the law" (R. 418).

In essence, the lower court's view of what the law requires is disclosed in one paragraph of its opinion opening with a quotation of the following finding by the Examiner:

"There is no evidence of record that North American adopted its name with *intent to deceive* the public or trade upon the goodwill and business reputation of American, or that *American has been injured* by such operation . . ." (R. 417) (Emphasis added).

This negative finding of the Examiner had not been adopted by the Board, but the lower court concluded, from its examination of the record, that "the Examiner was correct"—and it was the lack of findings and of "evidence that North American palmed itself off as American", or that North American's "advertising was intended to or did entice American's passengers . . . or that American was harmed", that led the lower court to hold that the Board's order was not supported by "the public interest findings demanded by the law" (R. 417-418).

It is quite true that there was no attempt in the evidence to prove that the respondent had adopted its name with the intent to trade upon the petitioner's reputation or that it had deliberately sought to simulate petitioner through such devices as similarity of advertising format. The respondent had

argued that therefore it could not be held to be afoul of Section 411 of the Act. In response to this argument the Board commented that when the respondent had adopted its name it was fully aware of the petitioner's reputation, that operations between major cities served by the petitioner loomed large in respondent's contemplation, and that it was obvious that the name similarity "might well cause confusion" (R. 207). Hence, said the Board, the respondent's use of the name in question "was not accidental or inadvertent" (R. 207).^{*} In other words, the case is not like one where two companies in different areas have innocently adopted similar names and later come into the same market. But unquestionably, as the Examiner and the lower court observed, there was no effort to prove conventional fraud or palming off.

It is also true that there was no effort to prove that any specific passengers had actually purchased tickets on respondent intending to purchase tickets on petitioner. Rather the evidence and findings dealt with such situations as that of persons seeking reservations and flight information from the petitioner under the impression that the respondent and the petitioner were the same, coming to the petitioner's counter to check in for flights under the same impression, claiming baggage at the wrong office under the same impression,

^{*} Indeed, the Board noted that the respondent's own evidence showed that in its radio commercials it referred to itself by name as one of "the nation's four great airlines" and that this was not even remotely true of the respondent, whereas it was true of the petitioner, which is one of the four carriers "commonly referred to as the 'Big Four'" (R. 207-208, n. 8). The radio commercials had been introduced by the respondent in the form of recordings which it was permitted to withdraw subject to call (R. 114).

and so on. From all of this evidence it might well have been found that the petitioner had actually lost business to the respondent as a result of this confusion, but the Board made no such express finding and the ease was not dealt with by the Board on the theory that any such finding was necessary or particularly material. In fact the Board's findings evince little interest in any question of the extent of harm to the petitioner; they are concerned wholly with the confusion and inconvenience caused to the travelling public.

SUMMARY OF ARGUMENT

It is agreed that Section 411 of the Civil Aeronautics Act, under which this proceeding is brought, is at least as comprehensive as is its prototype, Section 5 of the Trade Commission Act.

The lower court relied on a rather ancient obiter dictum of this Court to the effect that there could be no "unfair method of competition" within the meaning of Section 5 of the Trade Commission Act unless there were a showing of fraud. This Court has long since repudiated that dictum by its decisions, and a long line of cases under Section 5 deny the necessity for any showing of fraud or of palming off in the conventional common law sense. The lower court also erred in its determination that the Board's order was defective because not supported by a finding that the similarity of the respondent's name to that of the petitioner had caused loss of business to the latter. The Wheeler-Lea Amendment to Section 5 of the Trade Commission Act, which is incorporated in Section 411 of the Civil Aeronautics Act, was specifically intended to legislate out of the law the requirement of a showing of competitive injury.

Trade name confusion is an accepted subject of concern to the Trade Commission. Nor is it necessary, to support a cease and desist order, that there be a showing even of actual confusion. Probability of confusion is sufficient.

The lower court also misapplied this Court's decision in the *Klesner* case.⁹ It viewed that case as warranting a court to substitute its own judgment for that of the Board in determining what is to the interest of the public.

Actually the *Klesner* case meant no more than that the Trade Commission, in initiating Section 5 proceedings, should be motivated by concern for the public and should not lend its processes simply to the settlement of private grudges. This Court should reconsider the holding in the *Klesner* case that the administrative determination as to what is in the interest of the public is reviewable in a court. But, in any event, that case should not be applicable to Section 411 of the Civil Aeronautics Act, for that Act confers upon the Board, to a special and peculiar extent, the responsibility for the determination of the public interest in matters affecting air transportation. Section 5 of the Trade Commission Act, under which the *Klesner* case was decided, imposes no such degree of reliance upon the special competence of the Commission.

However, even though the *Klesner* case were applicable here, the lower court plainly exceeded proper bounds for judicial review. The Board carefully and explicitly weighed the public's interest in the problem with which it dealt, the considerations moving it to action were of real public concern, and a court cannot override them with its own conceptions.

⁹ Federal Trade Commission v. Klesner, 280 U.S. 19 (1929).

I

THE COURT BELOW ERRED IN HOLDING THAT SECTION 411 OF THE CIVIL AERONAUTICS ACT IS CONFINED TO PRACTICES INVOLVING FRAUDULENT INTENT, PALMING OFF BY DECEPTION, AND INJURY TO A COMPETITOR.

The long dog-eared dictum from the *Gratz* case¹⁰ was freshened up by the lower court and became its principal reliance in striking down the Board's order (R. 423). The dictum was the well known remark of Mr. Justice McReynolds that the phrase "unfair method of competition" in Section 5 of the Trade Commission Act was "clearly inapplicable to practices never heretofore regarded as . . . deception, bad faith, fraud or oppression . . ."

While that dictum was over-reaching obiter,¹¹ it provided for some years effective ammunition for assaults upon the efforts of the Trade Commission. But after the October 1933 Term of this Court it was thought that the *Gratz* dictum had been laid quite at rest. Fifteen years ago Professor Handler stated categorically that *Federal Trade Commission v. Keppel & Bro.*, 291 U.S. 304 (1934), had overruled the *Gratz* remark. *Unfair Competition and the Federal Trade Commission*, 8 Geo. Wash. L. Rev. 399, 404

¹⁰ Federal Trade Commission v. Gratz, 253 U.S. 421, 427 (1920).

¹¹ Usually forgotten is the fact that what the Justice actually held, on behalf of a majority of the Court, was simply that insistence on selling together "such closely associated articles as ties and bagging" was in itself not wrongful, and that a complaint stated no case under Section 5 where it did no more than to allege such sales "without deception, misrepresentation, or oppression, and at fair prices, to purchasers willing to take it upon terms openly announced." 253 U.S. at 428.

(1940). Plainly the lower court found its guidance in the wrong precedent.

Even before the *Keppel* case, Mr. Justice Cardozo's opinion for a unanimous Court, during the same Term, in *Federal Trade Commission v. Algoma Co.*, 291 U.S. 67 (1934), had all but buried the *Gratz* dictum. There a Trade Commission order had been entered to prevent sale of Western yellow pine under the name "California white pine". The order was attacked, under the *Gratz* theory, on the ground, among others, that adoption of that name had been entirely innocent of any intent to deceive. 291 U.S. at 79. It was shown that the name had been extensively used in one section of the country for some thirty years and that even the Bureau of Standards had approved its use. 291 U.S. at 71, 74. But Mr. Justice Cardozo stated that, however innocently the name had been adopted, where it was found that it had the "capacity to deceive" the Commission could prevent its use even though the practice "does not amount to fraud". 291 U.S. at 81.

Then, in the *Keppel* case, Mr. Justice Stone, again for a unanimous Court, squarely rejected the *Gratz* theory. There the Commission had ordered a stop to the sale of penny candy involving an element of chance. The order was assaulted on the ground that there was no violation of any anti-lottery law and that everything was fully explained and above board so that there was not the slightest element of deception; and the *Gratz* dictum was the authority cited to the Court. The Court accepted, for the sake of argument, the proposition that there was no violation of any anti-lottery law and no element of deception. 291 U.S. at 309, 313. But it held, the Commission was not confined

to striking down practices amounting to common law unfair competition; the very purpose of using the phrase "unfair method of competition" in the Trade Commission Act was to reach beyond the traditional concepts of proscribed trade methods. 291 U.S. at 310-312. The Commission had a broad discretion, and its judgment was to be given great weight. 291 U.S. at 314. Hence the Commission was not limited to striking at practices involving fraud or deception.

Consistently, in dealing with Trade Commission orders, the Courts of Appeals, since the *Keppel* case, have rejected argument that Section 5 of the Trade Commission Act reaches only cases of fraud or palming off or similar deliberate deception. *Pep Boys—Manny, Moe and Jack v. Federal Trade Commission*, 122 F.2d 158, 161 (3rd Cir. 1941); *DDD Corp. v. Federal Trade Commission*, 125 F.2d 679, 682 (7th Cir. 1942); *Charles of the Ritz v. Federal Trade Commission*, 143 F.2d 676, 680 (2nd Cir. 1944); *Gimbel Bros. v. Federal Trade Commission*, 116 F.2d 578, 579 (2nd Cir. 1941); see *Koch v. Federal Trade Commission*, 206 F.2d 311, 319 (6th Cir. 1953). And see *Reilly v. Pinkus*, 338 U.S. 269, 277 (1949).

The lower court's effort to introduce into Section 411 of the Civil Aeronautics Act limitations rejected under the Trade Commission Act is error.¹²

Palpable error, too, is the lower court's holding that the Board's order is defective because there was no

¹² That Section 411 of the Civil Aeronautics Act is at least as broad as Section 5 of the Trade Commission Act is, of course, apparent on the face of the two statutory provisions. It was so found by the Examiner (R. 190), the Board (R. 224) and the Court of Appeals (R. 432), and the legislative history leaves no room for doubt (R. 421-422). And see note 14, *infra*, p. 23.

showing of actual loss of business suffered by the petitioner. It missed the significance of the Wheeler-Lea Amendment to the Trade Commission Act, for not only does the court emphasize the absence of a showing of competitive harm but it even summarizes *Federal Trade Commission v. Raladam Co.*, 283 U.S. 643 (1931), which required a showing of competitive injury, as though that case remained the law. See the lower court's summary of the *Raladam* case (R. 433). But the competitive injury requirement of the *Raladam* case was legislated out of Section 5 of the Trade Commission Act by the Wheeler-Lea Amendment in 1938,¹³ the substance of which was included in the wording of Section 411 of the Civil Aeronautics Act a few weeks thereafter.¹⁴ Since 1938 an argument that an order such as is here in question should be set aside because no competitor has been hurt is "hardly worthy of serious or extended consideration." *Eugene Dietzgen Co. v. Federal Trade Commission*, 142 F.2d 321, 327 (7th Cir. 1944), cert. denied, 323 U.S. 730 (1944).

¹³ H. Rep. No. 1613, 75th Cong., 1st Sess. 3 (1937); *BEER, FEDERAL TRADE LAW AND PRACTICE* 79 (1942).

¹⁴ 52 Stat. 111 (1938). On April 6, 1938—a few days after the enactment on March 31, 1938 of the Wheeler-Lea Amendment to the Trade Commission Act—Senator Truman, Chairman of the subcommittee holding hearings on the aviation bills, introduced a bill with an amendment to the counterpart of Section 411 so that the section "conforms to the recent amendments of the Federal Trade Commission Act." Hearings before the Subcommittee of the Senate Committee on Interstate Commerce on S. 3659, 75th Cong., 3d Sess. 5 (1938); 83 Cong. Rec. 6726 (1938). See also, 83 Cong. Rec. 6431 (1938).

II

AN UNFAIR PRACTICE OR METHOD OF COMPETITION IS ABUNDANTLY DISCLOSED BY THE BOARD'S FINDINGS.

Section 411 of the Civil Aeronautics Act, in its second sentence, provides that if the Board finds an unfair or deceptive practice or unfair method of competition it shall order the carrier to cease and desist.

In the comparable Section 5 of the Trade Commission Act the phrase "unfair method of competition" covers not only common law unfair competition but a much wider range. This Court has been at pains to point out that Congress deliberately adopted a phrase that would not be held to the limits of the common law. *Federal Trade Commission v. Keppel & Bro.*, 291 U.S. 304, 310-312 (1934). Quite recently it again observed:

"... The 'unfair methods of competition' which are condemned by § 5(a) of the Act, are not confined to those that were illegal at common law or that were condemned by the Sherman Act. . . . Congress advisedly left the concept flexible to be defined with particularity by the myriad of cases from the field of business." *Federal Trade Commission v. Motion Picture Adv. Co.*, 344 U.S. 392, 394 (1953).

And when, by the Wheeler-Lea Amendment of 1938, Section 5 was extended to include unfair or deceptive practices, as well as unfair methods of competition; the Commission's power to proscribe was still further broadened. Section 411 of the Civil Aeronautics Act, especially when considered in its context of special regulation of a common carrier industry peculiarly

affected with a public interest, is at least as comprehensive as is Section 5 of the Trade Commission Act.

Advertising, however innocently adopted, which has the "capacity to deceive" is within the Commission's power to curb under Section 5. *Federal Trade Commission v. Algoma Co.*, 291 U.S. 67, 81 (1934). The use of a trade name is simply a form of advertising and is an accepted subject of Commission scrutiny.¹⁵ Moreover it is not necessary, to sustain a Commission order, that there be a showing of actual deception of the public; the likelihood of the public's being misled suffices. *Pep Boys—Manny, Moe and Jack v. Federal Trade Commission*, 122 F.2d 158, 161 (3rd Cir. 1941); *Charles of the Ritz v. Federal Trade Commission*, 143 F.2d 676, 680 (2nd Cir. 1944).¹⁶ And such likelihood

¹⁵ In 16 C.F.R. § 3.2240, there are listed 43 Trade Commission cases involving confusing trade names of business concerns, and in 16 C.F.R. § 3.2245 there are 34 cases, which include some repeats from the above category, of confusing trade names of products.

¹⁶ The rule is the same in common law unfair competition and trade-mark law. *E.g.*, *Standard Brands v. Smidler*, 151 F.2d 34, 37 (2d Cir. 1945) ("It was enough that an appreciable number of prospective purchasers were likely to be thus misled."); *United Drug Co. v. Obear-Nester Glass Co.*, 111 F.2d 997, 1000 (8th Cir. 1940), *cert. denied*, 311 U.S. 665 (1940) ("It is sufficient if the proof shows that purchasers are likely to be deceived or confused."); *Bunte Bros. v. Standard Chocolates*, 45 F. Supp. 478, 481 (D. Mass. 1942) ("... the basic question involved in all of them is whether there is likelihood of confusion."); *Esquire, Inc. v. Maira*, 101 F. Supp. 398, 402 (M.D. Pa. 1951) ("Evidence of specific instances of confusion is unnecessary."). See also, *Stork Restaurant v. Sahati*, 166 F.2d 348, 359 (9th Cir. 1948); *Majestic Mfg. Co. v. Kokenes*, 67 F. Supp. 282, 287 (N.D. Ala. 1946); NIMS, UNFAIR COMPETITION AND TRADE-MARKS 1049 (4th

may properly be determined by the Commission without testimony from consumers themselves. *Charles of the Ritz v. Federal Trade Commission, supra*; cf. *New American Library of W. L. v. Federal Trade Commission*, 213 F.2d 143 (2nd Cir. 1954). Actually, in making a judgment as to the likelihood of consumer confusion, the testimony of persons observing consumer behavior is especially revealing, and "without

ed. 1947). Moreover, in one of the most recent cases in this field the Court of Appeals reversed the District Court's refusal to enjoin because the "wrong thus consisted of the fact that such a visitor [at the home of a purchaser] would be likely to assume that the clock was an Atmos clock." *Mastercrafters C. & R. Co. v. Vacheron & Const. Le C^o W.*, 221 F.2d 464, 466 (2d Cir. 1955), *cert. denied*, 350 U.S. 832 (1955).

The Lanham Trade-Mark Act, 60 Stat. 427 (1946), 15 U.S.C. § 1051-1127, embodies the concept of probable public confusion as the key to registration and protection of trade-marks. Section 2(d) prohibits registration of any mark which so resembles a prior mark "as to be likely, when applied to the goods of the applicant, to cause confusion or mistake . . ." Similarly, Section 16 authorizes an interference proceeding on an application whenever the applied-for mark so resembles a prior mark "as to be likely . . . to cause confusion or mistake".

In this same connection, it is noteworthy that this Court, in dealing with the Trade Commission Act, has emphasized that it was the hope of the sponsors of the Act that its "effect might be prophylactic" and that it would stop in their incipency practices which, full-blown, would cause actual harm. *Fashion Guild v. Trade Commission*, 312 U.S. 457, 566 (1941); *Federal Trade Commission v. Motion Picture Adv. Co.*, 344 U.S. 392, 394-395 (1953). These teachings of this Court mean that the record need not contain the *corpus delicti* before the Board can enter a cease and desist order. Rather, there need be only a probability of confusion. The record here goes far beyond that.

this type of proof it would be difficult to show confusion."¹⁷

Even the common law of unfair competition has always been concerned with the use of a business name sufficiently similar to a previously established name as to create likelihood of consumer confusion. Injunctive relief is afforded, as distinguished from damages, even though the junior user is quite innocent of fraud or intent to deceive.¹⁸ The very name "American", where it has come to signify a particular company, service, or product, as was shown to be true in this case (*supra* p. 11), has often been protected against confusing similarity of use by others.¹⁹

¹⁷ *S. C. Johnson & Son v. Johnson*, 28 F. Supp. 744, 749 (W.D. N.Y. 1939), *relief mod. on appeal*, 116 F.2d 427 (2d Cir. 1940). See also, *Gehl v. Hebe Co.*, 276 Fed. 271, 272-273 (7th Cir. 1921) (consumer testimony "is not easily available, nor indeed necessary where the words themselves suggest it."). Particularly apt to the instant case is *Seattle Taxicab Co. v. De Jarlais*, 135 Wash. 60, 66, 236 Pac. 785, 787 (1925), wherein the court emphasized, in considering an argument based on the paucity of direct consumer testimony, that it must be "remembered that users of taxicabs are largely tourists and nonresidents, that no one likes to make complaint, and few will do so if the result is likely to involve them in matters which may interrupt their movements or delay the execution of their own plans . . ."

¹⁸ *E.g.*, *Stork-Restaurant v. Sahati*, 166 F.2d 348, 359-360 (9th Cir. 1948); *Navy Club v. All Navy Club*, 85 F. Supp. 679, 682 (D.R.I. 1949); *Household Finance Corp. v. General Finance Credit Corp.*, 49 F. Supp. 541, 542 (D.N.J. 1943).

¹⁹ *Shaver v. Heller & Merz Co.*, 108 Fed. 821, 824-825 (8th Cir. 1901) (*American Ball Blue and American Wash Blue*); *American Thread Co. v. North American Thread Co.*, 33 F. Supp. 616, 618 (S.D.N.Y. 1935); *Dennison Mfg. Co. v. Thomas Mfg. Co.*, 94 Fed. 651 (C.C. Del. 1899) (*American Express*); *American Home Benefit Assn., Inc. v. American Benefit Assn., Inc.*, 63 Idaho 754, 761-

In short, there was nothing trail blazing in the Board's order—as the lower court seemed to feel (R. 414-415). The practice proscribed was, indeed, a very close kin to common law unfair competition.

763, 125 P.2d 1010, 1013-1014 (1942); *American Oil Co. v. Norkus*, 358 Pa. 407, 67 A.2d 868 (1948) (*American Oil Company and American Oil Burner Service*); *American Shops v. American Fashion Shops*, 13 N.J. Super. 416, 423, 80 A.2d 575, 578 (Super. Ct. 1951), *cert. denied*, 7 N.J. 576, 83 A.2d, 379 (1951); *Rosenberg v. Rosenthal*, 135 Misc. 282, 284-285, 238 N.Y. Supp. 62, 64-65 (S. Ct. 1929). See *National Biscuit Co. v. Sheridan*, 44 F.2d 987, 988 (C.C.P.A. 1930) (*American Beauty*). Here the words "American Airlines" do not have a mere geographic meaning because, as Judge Ryan once observed, "words in the public domain may, through continued application to a specific . . . commercial activity, acquire an association with the user and the product or field so as to create a syndetic meaning for the word." *Conde Nast Publications v. Vogue School of Fashion M.*, 105 F. Supp. 325, 330-331 (S.D.N.Y. 1952).

Other leading cases on the use of geographic names as trade names are, *La Touraine Coffee Co. v. Lorraine Coffee Co.*, 157 F.2d 115 (2d Cir. 1946), *cert. denied*, 329 U.S. 771 (1946); *C. & W. Thum Co. v. Ackerman*, 257 Fed. 394 (6th Cir. 1919); *American Waltham Watch Co. v. United States Watch Co.*, 173 Mass. 85, 53 N.E. 141 (1899) (opinion by Judge Holmes).

Though the argument was rejected by the Board, the respondent argued that the name American is not entitled to protection because that word has been used in the names of three other air carriers (R. 206-207). The three uses referred to give no support to the respondent's argument.

(a) One such case was the use of the name "Air America" by another large irregular carrier like the respondent. As to this, the Board pointed out that it had a Section 411 proceeding pending in that case (R. 206). Since the Board's decision herein, the hotly contested Air America proceeding terminated with an order to cease and desist which was not appealed. The Board's findings in that case are worth examination, for they further delineate the seriousness to the public of the consequences of name similarity. See *Air America Section 411 Proceeding*, C.A.B.

Nor can there be doubt that the findings disclose confusion of the public. On occasion even a labor union, merchants, and the Post Office Department mixed up the two carriers, and there was revealed a constant stream of confused passengers and would-be

Order No. E-8470, June 24, 1954, mimeographed opinion pp. 5, 7-9, Appendix, pp. 13-22, 47-49.

(b) A second instance of use was that of "All American Airways" (R. 206). But that carrier is a small local service carrier (R. 206) and while using that name operated only quite limited feeder services emanating from Pittsburgh (R. 172, 300). Furthermore during most of the time during which it used that name it carried nothing but mail and express—and *no passengers*—with an experimental pick-up device (R. 172, 286-289). Some time after it began a regular passenger operation it changed its name to Allegheny Airlines (R. 292). *See All American Certificate Renewal Case, C.A.B. Order No. E-7294, April 10, 1953, mimeographed opinion p. 4, n. 1, Appendix B, pp. 7-8; All American Suspension Case, 10 C.A.B. 24, 25-26, 35-36 (1949); All American, Pick-Up, Delivery Service, 2 C.A.B. 133, 134-137, 151-152 (1940). Whatever problem may have been created by its use of the name "All American" was eliminated before it became of any importance. Cf. Oregon-Washington Plywood Co. v. Federal Trade Commission, 194 F.2d 48 (9th Cir. 1952).

(c) The third use cited by respondent was that of "Pan American World Airways" (R. 206-207). That carrier operates only international and overseas service in areas quite distinct from the areas served by petitioner (R. 206-207); actually Pan American World Airways and American Airlines do not serve a single pair of cities in common. Moreover the former and the latter have been operating under their respective names since the very earliest days of air transportation; the record here is silent as to the extent, if any, of public confusion between them but it is reasonable to assume that, with their long standing operations in distinct areas, any such confusion would have become insubstantial. It is profitless to speculate as to what might be done were a real problem to emerge. Cf. Federal Trade Commission v. Algoma Co., 291 U.S. 67, 79, 81 (1934); Tillman & Bendel v. California Pack-

passengers, with some persons insisting even after explanation that the two carriers were the same.²⁰ In

ing Corporation, 63 F.2d 498, 505-507 (9th Cir. 1933), *cert. denied*, 290 U.S. 638 (1933).

In any event the fact of use of the name by others, as it was squarely held in *Galter v. Federal Trade Commission*, 186 F.2d 810, 814 (7th Cir. 1951), *cert. denied*, 342 U.S. 818 (1951), is no bar to a cease and desist order under Section 5 of the Trade Commission Act. And see *Federal Trade Commission v. Algoma Co.*, 291 U.S. 67, 80 (1934). *A fortiori* it is no bar here.

Even without the abundant evidentiary support that this record provides for the findings of the Board on the point, it is altogether apparent that the public understands that the petitioner's name, when used to identify an air service, means the petitioner and, as the Board found, does not merely signify "the airlines of this nation or continent generally" (R. 207).

Finally, it is pertinent to observe that the Board does not purport to prevent respondent from making use of the words "North American" in their geographic sense. If the respondent wishes to advertise to the public that it operates in North America or in America or that it is an airline of North American or of American nationality or location, it is fully privileged to do so.

²⁰ The findings of the Board are themselves quite extensive (R. 201-205, 221-223), but they summarize only a part of the evidence of actual public confusion established in the record. Thus, although the findings do summarize the incident in which an official of a labor union threatened to picket American because North American employed non-union labor (R. 222, 224, Exh. AA-4; R. 103, 154-155), the findings do not include the unchallenged fact that a San Bernardino attorney threatened to complain to the Federal Communications Commission about American's false advertising of fares until he subsequently discovered that he had heard radio advertisements of North American which he had confused with American (R. 20-21; Exh. AA-4; R. 103, 151-154). Similarly, the findings indicate that newspapers typically refer to petitioner as "American" (R. 206, Exh. AA-2; R. 102, 137-140), but they do not refer to the fact that three newspapers in Los Angeles erroneously reported that an American ticket office had been robbed, whereas in fact it was a North

the practical world of business, and especially in the rush of air transportation, it would be difficult to conceive of a clearer or more harmful case of public confusion from name similarity than is revealed in this case.

The Board did not speak idly when it held,

"The maintenance of high standards in dealing with the public is expected of common carriers, and the public has a right to be free of the inconveniences which flow from confusion between carriers engaging in the transportation of persons by air." (R. 208).

In fact, a basic objective of common carrier regulation is provision not only for public necessity but also for *public convenience*, and Section 411 is to serve that purpose just as are other provisions of the Civil Aeronautics Act.

American office (R. 28). Nor do the findings set forth the incident in which a group of men called American to settle a wager of money as to whether American and North American were, or were not, affiliated airlines (R. 91), and omitted is the incident in which a lady purchased a ticket on American, thinking it was North American, because a friend had told her that American in the past, had taken three days, instead of the scheduled few hours, to make a Chicago-Los Angeles trip (R. 61-63, Exh. AA-4; R. 103, 158-159). In short, the record is replete with case after case of actual confusion, and the Board's findings of confusion (R. 201-205) and probable confusion (R. 210) cannot be challenged.

III

THE COURT BELOW EXCEEDED PROPER BOUNDS IN HOLDING THAT IT COULD REVIEW AND REJECT THE BOARD'S DETERMINATION THAT THIS PROCEEDING "WOULD BE IN THE INTEREST OF THE PUBLIC".

The opinion of the court below reveals that it was moved by *Federal Trade Commission v. Klesner*, 280 U.S. 19 (1929), improperly to substitute its judgment for that of the Board as to what is "in the interest of the public".

Section 411 of the Civil Aeronautics Act contains two sentences. The first sentence states that the Board *may*, either on its own initiative or on complaint, "if it considers that such action by it would be in the interest of the public," investigate and determine whether a carrier is engaged in unfair or deceptive practices or unfair methods of competition. The second sentence is mandatory: if, after hearing the case, the Board finds that the carrier is engaged in such practices or methods the Board *shall* order such carrier to cease and desist therefrom.

The lower court read these sentences as though they stated that the Board might institute a proceeding and then, if it found an unfair practice or method, it should enter a cease and desist order only if such order is in the public interest. The court then interpreted the *Klesner* case to give it, the court, free reign to determine what is in the public interest.

We urge that the *Klesner* case, even if it still has vitality under Section 5 of the Trade Commission Act, is not applicable to Section 411 of the Civil Aero-

nautics Act, or, in any event, that the lower court erred in its interpretation of the *Klesner* case.

A. WHAT IS THE KLESNER CASE?

Doubtless because the *Klesner* case has been generally regarded in recent years as of minor if any importance²¹ there is a tendency to treat it rather loosely, and this tendency plainly led the lower court astray. Never until the present case has it been applied in any significant way. *Klesner* should be precisely measured.

The case arose under Section 5 of the Trade Commission Act. Subsection (a) of that Section directs the Commission to prevent unfair methods of competition (and, since 1938, unfair or deceptive acts or practices). Subsection (b) provides that when the Commission has reason to believe that a person is using an unfair method "and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public" it shall make charges, hold a hearing, and, if it finds such an unfair method, issue a cease and desist order.

In the *Klesner* case a vendetta was waged between two merchants in Washington, D. C., which began in November, 1915,²² a little over a year after adoption of the Trade Commission Act. Their controversy grew out of an admitted violation of an agreement between them resulting in threats of personal violence and leading to one's having the other arrested. Out

²¹ See Handler, Unfair Competition and the Federal Trade Commission, 8 GEO. WASH. L. REV. 399, 404 (1940).

²² 280 U.S. at 23.

of petty spite the latter began to use the trade name long in use by the other.²³ The senior user of the name promptly brought suit in the courts of the District of Columbia to enjoin the junior user. But on December 23, 1915, after answer to a rule to show cause and argument of counsel, the rule to show cause was dismissed. No further proceedings were had in that suit and it was finally dismissed four and a half years later, in May, 1920.²⁴ Then in December, 1920, the senior user of the name turned to the Trade Commission.²⁵ The Commission issued a complaint against the junior user, proceedings were held, and an order to cease and desist from using the name was entered in June, 1922.²⁶ It was not until May, 1924, that the Trade Commission brought action to enforce its order²⁷—nearly nine years after the fuss arose.

The Trade Commission's order was based on findings that customers had been confused. The Supreme Court, however, in holding that the Commission's order should not be enforced, pointed out that the Commission's action was not taken until years of this petty squabbling had elapsed and held:

²³ 280 U.S. at 24, 28. See also *Federal Trade Commission v. Klesner*, 25 F.2d 524 (D.C. Cir. 1928).

²⁴ 280 U.S. at 29, n. 7. There was an obvious question as to whether the particular trade name was anything other than descriptive of the business the parties were engaged in and therefore not entitled to protection. See *Federal Trade Commission v. Klesner*, 25 F.2d 524, 525 (D.C. Cir. 1928).

²⁵ 25 F.2d at 524; 280 U.S. at 23.

²⁶ 280 U.S. at 23.

²⁷ 280 U.S. at 23.

"Whatever confusion had originally resulted from Klesner's use of the words must have been largely dissipated before the Commission first took action. If members of the public were in 1920, or later, seriously interested in the matter, it must have been because they had become partisans in the private controversy between Sammons and Klesner." 280 U.S. at 29.

The Court then determined that under Section 5 of the Trade Commission Act a complaint could be issued only if it appeared to the Commission that a proceeding "would be to the interest of the public" and that if at any time during the proceeding it developed that the facts show "that the proceeding which it authorized is not in the public interest" the Commission should dismiss the complaint. 280 U.S. at 30. In this case the Court held that the facts developed at the hearing "show affirmatively the private character of the controversy" and therefore that the complaint had been improvidently issued and should have been dismissed. *Idem*.

At most, therefore, the *Klesner* case holds merely that, when the facts as developed disclose only a private squabble and an effort by a disappointed litigant to find a forum after his appeal to the civil courts had failed, the Commission should drop its proceeding as improvidently begun.

B. THE RULE OF THE KLESNER CASE SHOULD BE RECONSIDERED AND IN NO EVENT SHOULD IT BE APPLICABLE TO SECTION 411 OF THE CIVIL AERONAUTICS ACT..

There can be no question as to the wisdom of the rule that the Trade Commission should be actuated by a desire to protect the public and should not lend its process simply to the settlement of a private grudge.

The difficulty with the *Klesner* case, however, is that it asserts the power of judicial review on the issue as to whether a Commission investigation would be "to the interest of the public". This would inject the courts into an area of inquiry peculiarly administrative in character and inappropriate for judicial examination. In a sense the Commission's function in applying the statutory phrase—"if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public"—is not unlike the function of the Department of Justice in determining whether an anti-trust proceeding should be instituted. Compare *United States v. Morton Salt Co.*, 338 U.S. 632, 640 *et seq.* (1950). The function, in short, is one essentially executive in character and hardly, if at all, susceptible to the kind of determination which courts are equipped to make.

This is the reason, no doubt, that in the quarter century since the decision in the *Klesner* case it has been of little, if any, significance save to evoke an occasional form of words in judicial opinions. See, e.g., *Parke, Austin & Lipscomb v. Federal Trade Commission*, 142 F.2d 437, 441 (2nd Cir. 1944), cert. denied, 323 U.S. 753 (1944). And it is not hard to understand why Judge Learned Hand observed, of the *Klesner* case, that "... it is doubtful whether today the same answer would be given". *Moretrench Corp. v. Federal Trade Commission*, 127 F.2d 792, 795 (2nd Cir. 1942).

It is suggested, therefore, that the decision in the *Klesner* case that the issue of what "would be to the

interest of the public" is justiciable should now be reconsidered.²⁸

In any event, it surely would be going too far to hold, as did the lower court, that such an issue under Section 411 of the Civil Aeronautics Act is justiciable. That section is in a context very different from that of Section 5 of the Trade Commission Act. The difference in context is strong reason for refusing to apply the *Klesner* precedent to the Civil Aeronautics Act.

Whereas the Federal Trade Commission, under its Act, is dealing with miscellaneous business enterprises throughout our economy, under the Civil Aeronautics Act the Civil Aeronautics Board applies itself to the highly specialized questions of the air transport industry and is intended by Congress to have an expertness and to be relied upon in the application of the Act to a degree which could never be possible of an agency such as the Federal Trade Commission having only a sort of roving commission over the whole field of business.

One of the very premises of the Civil Aeronautics Act is that an air carrier and its way of doing business are necessarily of concern to the public to a degree not at all true of ordinary commercial companies. That is the reason for the requirement of certificates of public convenience and necessity, for the detailed regulation of rates, practices, services, interlocking relationships, and so forth. That may be the reason, moreover, that under Section 411 provision is made for a private

²⁸ Mr. Gerard C. Henderson, in his landmark work in 1924, viewed the public interest issue as not subject to court review. THE FEDERAL TRADE COMMISSION 53-54

carrier to become a complainant, a provision for which there is no counterpart in Section 5 of the Trade Commission Act.

Moreover, it is one thing to say that a court might be equipped to determine whether there is any interest on the part of the public in a squabble between two shade shops in Washington, D. C.; it is quite another thing to suggest that a court is equipped to measure the extent of the public's interest in a particular practice affecting the complex, dynamic and esoteric air carrier industry with which the Civil Aeronautics Board is concerned every minute of every day. It is submitted that the lower court undertook to cope with a question with which it is not equipped to cope and with which Congress never intended that it should be concerned.

C. EVEN IF THE KLESNER CASE WERE APPLICABLE THE LOWER COURT MISAPPLIED IT.

Even if the *Klesner* case were to have any bearing on a Section 411 proceeding the lower court plainly misconceived its appropriate application.

At most the *Klesner* case could mean only that when Section 411 says that the Board may proceed "if it considers that such action by it would be in the interest of the public" the Board's determination must be made in good faith and it must be inspired by considerations relating to the public rather than responding simply to a private grudge.

The facts in the present case as found by the Board and as disclosed in the record overwhelmingly demonstrate that, in good faith, the Board was prompted by considerations of public concern.

As shown in its Business Name Regulation a serious public problem had arisen, especially among large irregular carriers, of which the respondent is one, affecting the public very directly. See *supra*, p. 8. Then when the question of respondent's use of the North American name came to the Board's attention, the Board considered the matter for some three months before determining to institute its investigation, a consideration which dealt not only with the various pleadings but also with "evidence by way of affidavits" (R. 3, 5). This determination to commence the proceeding was not contested by the respondent in the court below. Indeed, the particular issue dealt with in the *Klesner* case—that is, *whether the facts disclose that the initiation of the proceeding was warranted*—was not even presented by the respondent to the lower court. (R. 307; see *supra*, p. 15).

Then after an exhaustive hearing and in agreement with its Examiner, who had observed the witnesses and heard the evidence, and whose Initial Decision disclosed a full realization that the Board is concerned with the interest of the public (R. 197-198, 418), the Board specifically and in much more than formal or casual detail related the interest of the public to the problem it dealt with. See *supra*, pp. 13-14.

That interest is manifest. Air transportation does not work even today with the smoothness of older forms of surface transportation, as the scene at any airport will testify. Thousands upon thousands—even millions—of passengers are either wholly or relatively unsophisticated in the ways of the airlines, whether the older scheduled carriers or the newer irregular carriers. The rush and confusion at airports, the

difficulties of making reservations on overtaxed telephone lines, the ever present uncertainty as to exactly when a plane will leave or arrive, or whether, because of weather or otherwise, it will have to land at an "alternate" airport instead of its regular airport, these and many other characteristics peculiar to the air carrier industry present altogether sufficient difficulties. To inject into this picture the additional element of confusion, delay, misunderstanding, and inconvenience, resulting from name similarity, and leading to calling the wrong carrier, checking at the wrong counter, meeting the wrong plane, and the other problems recited by the Board, is certainly of sufficient concern to the public to testify to the Board's good faith in instituting and carrying through this proceeding.

The lower court, however, examined the case, and applied the *Klesner* decision, without any regard for these considerations. It read Section 411 as though that section stated that the Board could enter a cease and desist order only "if it finds a practice or method of competition contrary to the public interest". That is not what the statute says—but even if it did neither it nor the *Klesner* case gives a court any warrant to substitute its judgment for that of the Board as the lower court did in this case. Compare *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 141-144 (1940); *Gray v. Powell*, 314 U.S. 402, 412, 413 (1941); *Universal Camera Corp. v. Labor Board*, 340 U.S. 474, 488 (1951).

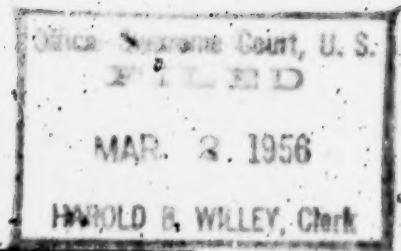
CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below must be reversed and the order of the Civil Aeronautics Board affirmed.

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SUPREME COURT, U.S.



No. 410

IN THE
Supreme Court of the United States

OCTOBER TERM, 1955

AMERICAN AIRLINES, INC., *Petitioner,*

v.

NORTH AMERICAN AIRLINES, INC., *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

In this brief, North American Airlines, Inc., will be referred to as the respondent, its brief will be cited as "Resp. Br.", and the brief of the Solicitor General will be cited as "Sol. Gen. Br."

In an Appendix hereto the petitioner treats certain irrelevant matter, outside the record, which the respondent's brief discusses under the heading, "A Preliminary Observation." Resp. Br., pp. 11-17.

THE APPLICATION OF KLESNER TO THIS CASE

The respondent now sweeps out of this case the contention that the *dictum* in the *Gratz* case is still the law. Resp. Br., p. 44. Nor is there, in respondent's argument here, any contention that a showing of loss of business by the petitioner is requisite to the validity of the Board's order. In both respects the respondent here sharply departs from the argument it had consistently made both before the Civil Aeronautics Board and before the lower court and which the lower court adopted in its opinion. *Infra*, p. 11.

The respondent now constructs its argument entirely from the doctrine of the *Klesner* case.

A. THE RESPONDENT OVERSTATES THE SIGNIFICANCE OF THE KLESNER DOCTRINE

There is, of course, no question but that, as the respondent says, the Federal Trade Commission conscientiously determines whether a Section 5 proceeding would be in the interest of the public; and often decides not to file a complaint, or decides to dismiss a complaint, upon reaching the view that no public purpose would be served by a proceeding. Resp. Br., pp. 21-23, 29-30. This is altogether proper—and not only the Trade Commission but other administrative agencies, to say nothing of the prosecuting authorities in the Department of Justice in their sphere of action, should thus seek to adhere to their obvious duties as public servants.

But the very nature of the administrative function involved in determining whether there is a public purpose to be achieved in an administrative proceeding

is not the sort which courts are especially equipped to review. What has happened in the application of *Klesner* in court review of Trade Commission orders seems to demonstrate this, and fully to explain Judge Learned Hand's doubt that the *Klesner* case would be decided the same way today. Pet. Br., p. 36.

The respondent has not pointed to a single case where a Trade Commission order has been reversed in reliance upon *Klesner*. Even in *Flynn & Emrich Co. v. Federal Trade Commission*, 52 F. 2d 836 (4th Cir. 1931)—the nearest there is to such a case—the discussion of *Klesner* was, at most, an alternative holding, and certainly was largely affected by the court's prior finding that there was no evidence whatever of bad faith in threatening patent infringement suits—which, on the facts in that particular case, was essential to show an unfair method of competition.

In *Motion Picture Advertising Service Co. v. Federal Trade Commission*, 194 F.2d 633 (5th Cir. 1952), so emphasized by the respondent, the court reversed the Commission on the ground that there was no showing of a Section 5 violation. Only by *obiter* did it suggest that the case might fall also on *Klesner* grounds. But, when the case reached this Court, the lower court was reversed on its determination that there was no Section 5 violation and this Court's opinion did not even mention the separate *Klesner* point. *Federal Trade Commission v. Motion Picture Advertising Service Co.*, 344 U.S. 392 (1953).

What appears to be happening is that, more and more, there is a tendency to hold that, if there is an unfair practice or method of competition, it is in the public interest to order it stopped. See, e.g., *E. B.*

Muller & Co. v. Federal Trade Commission, 142 F. 2d 511 (6th Cir. 1944), where, at p. 520, the court said:


"The record clearly shows that the petitioners have resorted to unfair and illegal practices within the meaning of the Act. Hence the proceeding aimed to suppress the practices is 'in the interest of the public'. *Federal Trade Commission v. R. F. Keppel & Bro.*, 291 U.S. 304, 54 S. Ct. 423, 425, 78 L. Ed. 814. Cf. *National Broadcasting Co. v. United States*, 319 U.S. 190, 224, 63 S. Ct. 997, 87 L. Ed. 1344, construing a similar provision of the Communications Act."

And see *Gimbel Bros. v. Federal Trade Commission*, 116 F. 2d 578, 579 (2d Cir. 1941); cf. *Parke, Austin & Lipscomb v. Federal Trade Commission*, 142 F. 2d 437, 441 (2d Cir. 1944). Indeed, Mr. Justice Stone's language in the *Keppel* case apparently was construed by the court in the *Muller* case to mean that "if the practice is unfair" the proceeding to suppress it is "to the interest of the public." 291 U.S. at 308.

Be that as it may, it would certainly be of dubious wisdom to apply *Klesner* as the respondent and the lower court would have it applied—as giving warrant to a court to second guess the agency on its administrative determination. That is not what *Klesner* held; and that is certainly not what the courts have done with *Klesner*.

B. THE KLESNER DOCTRINE IN ANY EVENT SHOULD BE INAPPLICABLE IN THE CONTEXT OF THE CIVIL AERONAUTICS ACT

Like the Trade Commission, the Civil Aeronautics Board, of course, should be moved by considerations of concern to the public.



But air carriers were removed from the scope of Section 5 of the Trade Commission Act, and the matter of unfair practices and methods of competition dealt with in the Civil Aeronautics Act, because the latter Act was intended as a complete and integrated pattern of specialized administrative regulation, with responsibility in the Board to mesh, coordinate, and administer the regulation in the light of the peculiar conditions of air transportation and of the unique public interest in the carriers making up that industry.

In this context, it does seem well nigh impossible for a court to apply the "interest of the public" standard as a *judicial* question. Just as the comparable standard in the Communications Act was held by this Court to be one for the administrative agency to apply, *National Broadcasting Co. v. United States*, 319 U.S. 190, 224 (1943), so here the agency to which Congress specifically granted the power must be the one to determine its exercise. Sol. Gen. Br., p. 19, n. 9.

Competitive practices among airlines are of far greater concern to the public than are the competitive practices, found to be of public concern, of a chain store selling radio and auto accessories,¹ a department store,² a wellpoint manufacturer,³ some flour blenders,⁴

¹ *Pep Boys—Manny Moe & Jack v. Federal Trade Commission*, 122 F.2d 158 (3d Cir. 1941).

² *Gimbel Bros. v. Federal Trade Commission*, 116 F. 2d 578 (2d Cir. 1941).

³ *Moretrench Corp. v. Federal Trade Commission*, 127 F.2d 792 (2d Cir. 1942) (a "wellpoint" is a highly specialized type of pump used to drain wet ground prior to building on it).

⁴ *Federal Trade Commission v. Royal Milling Co.*, 288 U.S. 212 (1933).

a correspondence school serving Latin Americans,⁵ or a seller of local movie advertisements.⁶ Common carrier air transportation is an essential national utility on which the public becomes every day more dependent. Even if a court is competent to draw a distinction between the public interest and the private interest in a spiteful squabble between two shade shops in one city or in the devices used to wheedle business from five purchasers of coal stokers, *cf. Flynn & Emrich Co. v. Federal Trade Commission*, 52 F.2d 836, 838-839 (4th Cir. 1931), it does not follow that a court is in a position to overrule the determination of the agency on that question where the competition is for extensive common carrier patronage from coast to coast.

The respondent admits that the Civil Aeronautics Board is meant by Congress to have a special competence "in matters concerning air traffic . . . generally". Resp. Br., p. 41. So it is. And there is no matter more directly concerning air traffic than the means employed to solicit it.

The respondent seeks to avoid the force of this consideration by pointing to the fact that "equity courts have developed an entire branch of jurisprudence" in the field of trademarks and trade name infringement (and urging that the Civil Aeronautics Board is altogether inexpert in that field. Resp. Br., p. 42. But that quite misses the point. The issue with which the *Klesner* case was concerned was not a matter of the private law of trade name infringement or even of the

⁵ *Branch v. Federal Trade Commission*, 141 F.2d 31 (7th Cir. 1944).

⁶ *Federal Trade Commission v. Motion Picture Advertising Service Co.*, 344 U.S. 392 (1953).

substantive content of statutory unfair methods of competition. This Court, indeed, was at pains, in its opinion in that case, to make it clear that it was not dealing with any such question: 280 U.S. at 25. The *Klesner* issue, rather, is what is "in the interest of the public". That is a question with which the "branch of jurisprudence" referred to by the respondent has absolutely nothing to do. In the *Klesner* sense, that particular question never arises before the equity courts. The real expert on that question, in the aviation field, is the Civil Aeronautics Board; a court would have to go far outside its normal competence to attempt to answer it.

C. WHATEVER MAY BE THE PROPER APPLICATION OF THE KLESNER CASE TODAY, THE BOARD'S FINDINGS AND ORDER FULLY COMPLY WITH ITS REQUIREMENTS

The respondent argues that *Klesner* somehow means that there is no public interest in a question involving trade names, and that any such question should be excluded entirely from the scope of Section 5 of the Trade Commission Act and Section 411 of the Civil Aeronautics Act.

The respondent's brief states the point variously, but apparently concedes that, *if there were fraud*, a trade name case would raise a question under Section 5 or Section 411. This concession is a curious effort to re-introduce, in this particular area, the *Gratz dictum* which even the respondent repudiates. It is hardly necessary to point, again, to the irrelevance of fraud. "The purpose of the statute is protection of the public, not punishment of a wrongdoer," and the innocence of the respondent is quite beside the point. *Gimbel Bros. v. Federal Trade Commission*, 116 F. 2d

578, 579 (2d Cir. 1941); Sol. Gen. Br., p. 13; Pet. Br., pp. 21-22. The harm to the confused airline traveller is the same whether the respondent's intent in adopting its name was innocent, Resp. Br., p. 38, or not. That the question is quite irrelevant to the interest of airline travellers is forcefully brought out by the fact that it was found on this very record that the respondent's own president recognized the travellers' confusion and, when passengers were destined to a point served by the respondent, would do "everything he could to 'steal' them." R. 223; Sol. Gen. Br., p. 17, n. 6; Pet. Br., p. 13.

Additionally, however, the respondent's argument overlooks the all-important fact that the public can be harmed by use of a trade name just as much as by the use of any other advertising practice. This is the reason that there have always been Section 5 cases involving use of trade names, Sol. Gen. Br., pp. 12-13; Pet. Br., p. 25, and in not a single case has a court even hinted that the Trade Commission has exceeded its jurisdiction because the controversy involved a trade name. If ever a case invited decision on that ground it was *Klesner*; but *Klesner* turned on the lack of any real public concern in the particular fuss between the shade shops.

Indeed, in air transportation, as distinguished from miscellaneous business, there is a special public inter-

⁷ The respondent's brief, at p. 38, implies that the Board "sustained" the Examiner's finding that there was no evidence that the respondent adopted its name "with intent to deceive . . ." This is not quite accurate. The Board did not adopt that finding; indeed it pointed out that the respondent's case is hardly one of wide-eyed innocence. Sol. Gen. Br., pp. 17-18; Pet. Br., pp. 16-17.

est in the carriers' names. Sol. Gen. Br., p. 15. The public, in getting where it wants to go without delay, is wholly dependent on the distinctiveness of the name by which an airline advertises itself; and the very conditions of a regulated industry, especially the airlines, where fares and many other details of service tend more and more toward uniformity, lead to ever increasing emphasis upon name advertising in the competitive struggle and in relations with the public. R. 10, 229. ✓

The reasons for the Board's concern with name confusion—in order to protect the public—were fully stated in the Board's findings, Pet. Br., pp. 13-14, and in its Business Name Regulation, *id.*, p. 8. See also Appendix, *infra*, pp. 25-26. It detracts in no degree from this interest that a confusingly similar name might also violate a private right. That is common to various unfair practices or methods.⁸ Nor is the public interest any the less because from its vindication a private interest might benefit; the *Klesner* case itself recognized that. *Federal Trade Commission v. Klesner*, 280 U.S. 19, 27 (1929); see also *E. B. Muller & Co. v. Federal Trade Commission*, 142 F. 2d 511, 520 (6th Cir. 1944).

Furthermore there is nothing in the particular facts of this case suggesting that it falls short of the *Klesner* standard of public interest—however significant that decision may be today. On the basis of the Board's findings, fully supported by its Examiner, a very im-

⁸ *E. B. Muller & Co. v. Federal Trade Commission*, 142 F.2d 511 (6th Cir. 1944); *Moretrench Corp. v. Federal Trade Commission*, 127 F.2d 792 (2d Cir. 1942); *cf. Independent Directory Corp. v. Federal Trade Commission*, 188 F.2d 468 (2d Cir. 1951).

portant public was directly affected on one of the leading air routes. Here is a much greater interest than the sufficient public interest found to exist among the customers of a half dozen flour blenders in Nashville, Tennessee, *Federal Trade Commission v. Royal Milling Co.*, 288 U.S. 212 (1933), or among an undetermined number of purchasers of an undetermined portion of 7,000 yards of cloth in New York City, *Gimbel Bros. v. Federal Trade Commission*, 116 F. 2d 578 (2d Cir. 1941), or among an undetermined number of purchasers of 5800 radio sets over a period of five years, *Pep Boys—Manny, Moe and Jack v. Federal Trade Commission*, 122 F. 2d 158 (3d Cir. 1941). The record here discloses a constant stream of people every week being subjected to all the ills flowing from name confusion. Sol. Gen. Br., pp. 16-18; Pet. Br., pp. 11-13, 29-31, and n. 20.

The Board's elaborate findings, much more careful and detailed than those to be found supporting Trade Commission orders, make it very clear that the public interest here is *not* the mere general community interest in vindicating private rights—the interest held inadequate in *Klesner*, 280 U.S. at 28. On the contrary the findings show unmistakably and explicitly that the Board took action in order to discharge its responsibility to protect air travellers on common carriers from costly confusion, inconvenience, delays, and outright imposition at busy airports. The respondent would have this responsibility discharged by the vagaries and chances of private litigation by competitors willing to sue in various state and federal courts under the technical law of trademarks and common law unfair competition. The Civil Aeronautics Act was never meant thus to ignore the interest

of the transient common carrier patron and to deny him the protection of public law. The respondent's argument professes to repudiate *Grafz* and *Raladam*; but the philosophy of those discredited cases echoes in its thesis. For on that thesis only the competitor, and then only in a common law case, would have relief.

The respondent's brief conspicuously ignores the findings and the record here, relying only on the fact that there was no finding of positive fraud—an irrelevant point. Resp. Br., p. 38. But see Pet. Br., pp. 16-18. A passage of the respondent's brief carries the heading, "The Lower Court Correctly Found that the 'Confusion' Was Unsubstantial . . ." Resp. Br., p. 38. But the very short discussion that follows on that page does nothing but refer to that paragraph of the lower court's opinion which points out that there was no evidence that the respondent adopted the name with intent to defraud or had "palmed itself off" or had actually "enticed" passengers to the injury of the petitioner. This passage of the opinion was responsive to the respondent's vigorous argument below that fraud and a showing of loss of business by the petitioner were essential to the validity of the order; in not the slightest degree does it impair the detailed findings of fact of both the Board and the Examiner showing the extensive, constant, and serious misleading and confusion suffered by the travelling public. R. 204, 204-205, 221-223; Sol. Gen. Br., pp. 5-6; Pet. Br., pp. 11-13. The respondent's brief blinks these findings.

The only other matter, addressed to the facts of this case, to which the respondent adverts is what it terms the case's procedural history. Resp. Br., pp.

37-38. The respondent finds fault in the fact that the petitioner produced the evidence at the hearing before the Board's Examiner. But since Section 411 provides for a private complainant, this is not surprising.⁹ And the Government attorney not only participated in the questioning but vigorously briefed and argued the case on the basis of the record made. Both the

⁹ Civil Aeronautics Board practice is different from Trade Commission practice, not only in Section 411 matters but in the entire administration of its Act, a difference arising from the quite different pattern of regulation in the two statutes. While, of course, private persons bring matters to the attention of the Trade Commission, only the Commission staff proceeds with and participates in a case. The statement in the respondent's brief that, in Section 5 Trade Commission cases, "interventions have frequently been sought and permitted in recent years," Resp. Br., p. 25, n. 16, is inaccurate. Reported materials give no support for this statement, which is made without citation, and inquiry at the Trade Commission confirms the fact, well known among practitioners, that allowance of intervention in such cases is virtually unknown, except that intervention for the purpose of filing a brief and making argument (amounting to, and usually designated as, an appearance *amici's*) has been permitted on extremely rare occasions. The intervention permitted to the State of Florida in the *Florida Citrus* case, referred to by the respondent, reflected a very unusual situation. The regulatory pattern of the Civil Aeronautics Act, on the other hand, is such that, even though the over-riding and controlling considerations guiding Board action are always those composing the "public convenience and necessity" and the "public interest", see Section 2 of the Act, 49 U.S.C. § 402, adversary participation by private parties on a full scale basis in Board cases is very frequent indeed. As a matter of fact, the Act contains a general provision for private complaints "with respect to anything done or omitted to be done by any person in contravention of any provision of this Act, or of any requirement established pursuant thereto." Section 1002(a), 49 U.S.C. § 642(a); cf. Section 1002(e), 49 U.S.C. § 642(e). This, of course, is in addition to the specific provision for private complaints in Section 411. As we have said

Examiner's findings and the Board's own opinion show a very clear understanding of the fact that their interest was in the public and not in the petitioner. R. 197, 207, 208. The clarity of this understanding, indeed, is emphasized by the fact that no effort was made to offer proof or to make findings on the extent to which the petitioner actually lost business. Sol. Gen. Br., p. 20, n. 10; Pet. Br., pp. 17-18. Neither the respondent's argument nor anything in the *Klesner* case can condemn the Board's conclusion: "... we have determined that the *public* should be protected from the effects of the confusion shown on the record by eliminating what we find to be the cause of such confusion." (Emphasis added.) R. 209.

II.

THE BELATED ISSUE ON THE SCOPE OF THE ORDER

In its reply brief in this Court the respondent objects, for the very first time in this case, to the scope of the Board's order. The order requires the respondent to cease using the North American name "or any other name which includes the word American." R. 230, 211. The same requirement was recommended by the Examiner in his initial decision. R. 199. The

in another connection, the context of Section 411 in the Civil Aeronautics Act is quite different from that of Section 5 of the Trade Commission Act. Pet. Br., pp. 35-38; *supra*, pp. 4-7.

Even in the case of the National Labor Relations Board, where private persons can only make "charges" of unfair labor practices and the complaint itself is filed by the General Counsel, a private person making a charge becomes a full scale party to the case. N.L.R.B. Rules and Regulations—Series 6, Secs. 102.8 and 102.38. Cf. also *Associated Industries v. Ickes*, 134 F. 2d 694, 704 (2d Cir.), *vacated as moot*, 326 U.S. 707 (1943).

respondent, urges that to require dropping the word "American" is too drastic a sanction. Resp. Br., pp. 46-47. The point is an afterthought—too belated.

Both in *Federal Trade Commission v. Royal Milling Co.*, 288 U.S. 212 (1933), and in *Jacob Siegel Co. v. Federal Trade Commission*, 327 U.S. 608 (1946), on which respondent relies, the question as to the scope of the order was properly raised both before the administrative agency, *Federal Trade Commission v. Royal Milling Co.*, 288 U.S. 212, 215 (1933); *Jacob Siegel Co.*, 43 F.T.C. 256, 261, 265 (1946), and before the lower court. Not so here.

Respondent spoke not a word on the question at the Board's hearing. Nor in a long brief filed with the Examiner was the point mentioned by the respondent. Both the Government's brief to the Examiner and the brief to him filed by the petitioner specifically requested an order of the breadth in question. The Examiner, as we have seen, so recommended. In exceptions to the Examiner's initial decision, comprising over forty pages, the respondent took no exception on that ground. In the respondent's brief to the Board it made no mention of the point. The transcript of its oral argument to the Board discloses no mention of the issue.

Only at the end of the opinion of the dissenting Board member was there any mention of the possibility of a less sweeping order. Even then the possibility mentioned was only that the respondent might "make more clear in its advertisements and contact with the public that it is not to be confused with American Airlines." R. 217. It is not difficult to understand why this should not have been persuasive to the

majority in view of its findings, referred to by the dissenter, that the respondent had changed its name with its eyes open and with obvious possibilities of confusion. R. 207, 228-229, to say nothing of the findings as to the nature and degree of confusion which continued even "after an explanation had been made that American and North American were two different airlines." R. 222. Nor is there here a case of the respondent's having invested many years' use of the name, as in the *Royal Milling Co.* and the *Siegel* cases. *Federal Trade Commission v. Royal Milling Co.*, 288 U.S. 212, 217. (1933); *Jacob Siegel Co. v. Federal Trade Commission*, 150 F. 2d 751, 752 (3d Cir. 1944). The respondent had changed its name very recently—as well as very deliberately. R. 207, 218, 228-229.

In any event, and even despite the dissenter's mention of the scope of the order, the respondent filed no petition for reconsideration with the Board and did not tender the issue to the lower court. By specific stipulation, the issues *were framed and limited at the pre-hearing conference in the lower court and included no such question.* R. 307-308.

In this petitioner's brief in the lower court attention was specifically invited to the fact that this issue was not presented. The respondent's brief in that court did not mention the point. Nor did it mention the point at the argument in that court.¹⁰

¹⁰ All of the several steps referred to are reflected in written documents, except that there is no transcript of the oral argument in the lower court. The record here, of course, does not contain all of these documents because no such question was presented to the lower court. The transcript of record actually certified by the Board to the lower court does include them. If the question had been raised below, the record here would have included appropriate excerpts from the relevant documents.

Nor did the lower court's opinion mention the point.¹¹

In the Petition for Certiorari no such issue was framed. Indeed, the Petition specifically pointed out that no such issue had been raised by the respondent in this case. Pet. for Cert., p. 14, n. In respondent's Brief in Opposition no such issue was raised and no exception was taken to the statement in the Petition that the point had not been raised.

If ever an issue were belated—and waived—this issue is such.

Section 1006(e) of the Civil Aeronautics Act which provides for judicial review of Board orders requires that:

“... No objection to an order of the Board shall be considered by the court unless such objection shall have been urged before the Board or, if it was not so urged, unless there were reasonable grounds for failure to do so.” 49 U.S.C. § 646(e).

The respondent obviously has no grounds for its failure to raise before the Board the point now made.

Moreover, issues will not be considered here which were not raised below. *Sonzinsky v. United States*, 300 U.S. 506, 514 (1937); *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 186 (1935).

To tolerate the respondent's raising of new issues at the eleventh hour would open the way to tactics

¹¹ Erroneous is the statement in the respondent's brief, at pp. 47 and 51, that the lower court dealt with this issue. It is not mentioned in the opinion below—which perhaps explains why the respondent cites no passage in that opinion.

whereby battles could be lost but wars won. The tactics of delay, of stringing proceedings out by raising first one issue and then another, while protected, as is this respondent, by stays of attempted administrative orders, can make administrative process futile. This very proceeding—in a seemingly simple case, so simple, indeed, that the respondent itself introduced very little evidence at the Board hearing—has already lasted for nearly three and a half years. Surely it is time that the proceeding reach an end.

Respectfully submitted,

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APPENDIX

THE IRRELEVANCE OF THE RESPONDENT'S "PRELIMINARY OBSERVATION"

Respondent's so-called "Preliminary Observation", Resp. Br., pp. 11-17, sets forth a highly selective and inaccurate discussion of "background" which, it insinuates, shows that the Board in the present case was acting in the interest of the petitioner rather than of the public, furthering efforts to "eliminate [repondent] from the air transport industry" as part of an alleged policy of the Civil Aeronautics Board to exclude from air transportation of passengers all but the air carriers who received grandfather certificates.

There is quite another side to the respondent's version of the "background." Within the United States, the Board has certificated more than a dozen new "local service" carriers which operate thousands of miles of routes, competing with grandfather carriers over some segments and actually supplanting grandfather carriers over others;¹ indeed these carriers are larger than many of the grandfather carriers were when the Act was adopted.² In Hawaii and in the Caribbean, the Board has certificated direct competi-

¹ See, e.g., *United Air Lines v. CAB*, 198 F. 2d 100, 103-104 (7th Cir. 1952); *Western Air Lines v. CAB*, 196 F. 2d 933, 936 (9th Cir. 1952).

² Last year these "local service" airlines together carried more revenue passenger miles than did all domestic grandfather airlines together in 1938. Even the smallest of these "local service" airlines carried more revenue passenger miles last year than did 10 of the 16 domestic grandfather carriers in 1938. *Annual Airline Statistics, Domestic Carriers, Calendar Years 1938-1942*, Table I (CAB, Economic Bureau, Rates and Audits Division 1943); *Summary of U.S. Local Service Airline Traffic For Calendar 1955*, *American Aviation Daily*, February 15, 1956.

tion with grandfather carriers by new carriers of passengers and cargo.³ In domestic and foreign cargo transportation, the Board has certificated numerous non-grandfather carriers which carry a very large share of the cargo traffic.⁴ In all, the Board has certificated some 39 "non-grandfather" carriers since 1938.⁵ This is in addition to forty-odd large irregular carriers authorized by the Board, operating both domestically and abroad, who have for years been competing most effectively with grandfather carriers, and whose authorizations have recently been vastly expanded. *Large Irregular Air Carrier Investigation*, CAB Order No. E-9744 (Mimeo.), November 15, 1955.⁶

Several of the grandfather carriers which were actually local service carriers in 1938 have been greatly expanded and transformed into highly competitive trunkline operators.⁷ And among the grandfather

³ See, e.g., Hawaiian Intraterritorial Service Case, 10 C.A.B. 62 (1948); Caribbean Area Case, 9 C.A.B. 534 (1948); Florida-Bahamas Service Case, 15 C.A.B. 884 (1952).

⁴ See, e.g., CAA Statistical Handbook of Civil Aviation, 1955, p. 90 (U.S. Dep't Commerce, 1955); North-South Air Freight Renewal Case, CAB Order No. E-9760 (Mimeo.), November 21, 1955; Transatlantic Cargo Case, CAB Order No. E-931J (Mimeo.), May 19, 1954; Additional Service to Puerto Rico Case, 12 C.A.B. 430 (1951); Air Freight Case, 10 C.A.B. 572 (1949).

⁵ *Aviation Study*, Sen. Doc. No. 163, 83d Cong., 2d Sess. 32-33 (1955).

⁶ This case is now on appeal in the United States Court of Appeals for the District of Columbia Circuit, No. 13044.

⁷ *Aviation Study*, Sen. Doc. No. 163, 83d Cong., 2d Sess. 32-34 (1955). The *Study* contains data and references to data submitted by the Board to show the development of several small grandfather carriers from sizes smaller than today's "local service" carriers. See also n. 2, *supra*. Since these data were prepared the Board has made substantial additional grants to several of these carriers.

carriers, both in the international and in the domestic field, the degree of direct competition has been intensified incalculably since the adoption of the Act. For example, there are now as many as seven carriers certificated between New York and Washington, five between New York and Chicago, four between Chicago and Los Angeles. Neither in rail nor in motor bus transportation is there even remotely comparable competition in degree, extent, and intensity.

Respondent claims to be the innovator of air coach service, saying that "It is common knowledge by now" that save for the non-certificated carriers, "particularly this respondent", there would have been long delay in the inauguration of coach service which the certificated carriers resisted "until quite recently." In support of this astounding statement, the respondent quotes from testimony before a Senate Committee by presidents of two of the large airlines stating their concern about experimenting with coach service in May, 1949. Resp. Br., p. 15. What the respondent fails to point out—among a great many other things—is that in the spring of 1949 the certificated carriers were just emerging from a shocking financial crisis growing, in large part, out of their re-equipment program after the War during which they moved from obsolete DC-3's and DC-4's to a new technological stage involving DC-6's and Constellations, among others. Problems encountered included even the grounding of million dollar airplanes until the source of mysterious fires in

See New York-Chicago Service Case, CAB Order No. E-9537 (Mimeo.), September 1, 1955 (Capital Airlines); Denver Service Case, CAB Order No. E-9735 (Mimeo.), November 14, 1955 (Continental Air Lines, Western Air Lines); Southwest-Northeast Service Case, CAB Order No. E-9758 (Mimeo.), November 21, 1955 (Braniff Airways, Capital Airlines, Delta Air Lines).

the air was ascertained. During this period, the Civil Aeronautics Board did insist that low-fare "coach" service by certificated carriers be confined to off-peak night time periods, and was cautious in its fare policy. But one of the very carriers whose president is quoted in the respondent's brief, this petitioner, by the fall of 1949 filed and vigorously supported a tariff which provided not only for full scale coach service without regard to off-peak periods but also for such service in the most modern aircraft, the DC-6. And the CAB was persuaded to allow that service.⁸ The coach service thereafter grew rapidly and constitutes 35.3% of the business of the domestic certificated carriers and 65.7% of the U.S. flag carriers operating internationally as of the twelve months ending September 1955.⁹ The respondent's claim to pioneering, made in its brief, rests on the fact that certain of its predecessors, during the time that the certificated carriers were involved in their financial and technological problems of transition to entirely new equipment; operated a limited amount of low fare service with a few obsolete war surplus two-engine craft which they had bought for a song. If the certificated carriers had followed the lead of the respondent's predecessors they would properly have been subject to most severe criticism for retarding, instead of accelerating, the development of modern air transports. Finally, it should be noted that the Senate Interstate and Foreign Commerce Com-

⁸ See *Transeontinental Coach-Type Service Case*, 14 C.A.B. 720, 725 (1951); *National Airlines, DC-6 Daylight Coach Case*, 14 C.A.B. 331, 336 (1951); *American Airlines, Mail Rates*, 10 C.A.B. 341, 342-343 (1949).

⁹ *Certificated Air Carrier Traffic Statistics*, September 1955, pp. 9-10 (CAB, Office of Carrier Accounts and Statistics, 1955).

mittee staff, after considerable study of this whole question, concluded:

"Whether the nonskeds have as they claim, brought new fleas and initiative into the business does not seem to require a categorical answer for present purposes, even assuming that the question is capable of such an answer. That their presence, and tactics, have resulted in an intensification of competition in the industry is clear. But it is far from clear that the net results of the intensified competition, and the competitive practices employed, have advanced us further toward the ultimate objectives laid down in the Civil Aeronautics Act, and which stand unquestioned today. There is persuasive evidence that ground has been lost."¹⁰

Respondent quotes recent testimony by a professor before a Congressional committee referring to "a death sentence" on the respondent, in which the professor gives the definition of the respondent's "crime" supplied by "one of its officials." Resp. Br., pp. 14-15. This is a reference to a case in which the Civil Aeronautics Board found a long record of willful and flagrant violation of law by the respondent. *Compliance Proceeding, Twentieth Century Airlines, CAB Order No. E-9360 (Mimeo.)*, July 1, 1955. As appears from the Board's opinion in this *Compliance Case*, the respondent, and its affiliated interests, have persisted in a course of illegal operation, involving, among other things, provision of regular service without securing a certificate of convenience and necessity as required by the Act. This same course of conduct goes back even to two predecessor companies, as referred to in the opinion in the *Compliance Case*, both of whose

¹⁰ *Aviation Study*, Sen. Doc. No. 163, 83d Cong., 2d Sess. 47 (1955).

operating authorities were revoked for similar violations. *Id.* at pp. 18 and 22. As the Board saw the question, it was whether the respondent, by main force and defiance, would dictate what air service there should be or whether the Act of Congress should do so. *Id.* at pp. 19-21.¹¹ The Board's opinion sets forth the facts at length.

The *Compliance Case* is now on appeal as No. 12858, in the United States Court of Appeals for the District of Columbia Circuit, where the record has been fully briefed and argued on both sides and the case is pending decision.

Arguments along the lines of respondent's "Preliminary Observations" are also being made by the respondent in its appeals of three route certificate cases also pending in that Court where, again, records are being fully briefed and argued. Court of Appeals Nos. 12942, 13053, 13132, cited in Resp. Br., p. 12 at

¹¹ It is of some interest, also, to note that, in one of the compliance cases involving a predecessor company, the attitude toward the law, prompting violation, is disclosed as follows:

"Upon being confronted with the above information, respondent made no attempt to adjust its operations to conform with the Board's regulations. Instead it announced to the Board's representative, through its vice president, that no adjustments in operations were contemplated and if any adjustments were made *they would have to be in the Board's regulations*. The attitude of respondent as displayed by this announcement is consistent with the course of conduct it followed in operating its aircraft prior to and after March 1948." Standard Air Lines, Noncertificated Operations, 10 C.A.B. 486, 497 (1949) (Emphasis added).

See also *Viking Airlines, Noncertificated Operations*, 11 C.A.B. 401 (1950). These are the two cases, involving predecessor companies, to which the Board referred in its opinion in the respondent's *Compliance Case*.

end of n. 5.^{11a} In the decisions there appealed, the Board denied the respondent's applications after full comparative hearings of the applications of the respondent and of numerous other carriers, on the ground, among others, that strengthening certain of the smaller carriers by extending them into new territory would better serve the public interest than provision of such service by the respondent. Also important to the Board's comparative decision in these cases was its finding as to the unfitness of the respondent based upon a record of willful and flagrant violation of the law detailed at length in the *Compliance Case*. See, *New York-Chicago Service Case*, CAB Order No. E-9537 (Mimeo.), September 1, 1955, pp. 26-28; *Denver Service Case*, CAB Order No. E-9735 (Mimeo.); November 14, 1955, pp. 17-18; *Southwest-Northeast Service Case*, CAB Order No. E-9758 (Mimeo.), November 21, 1955, pp. 33-35.

The point of the matter, of course, is that the respondent is carrying into the brief in this Court an attack on the Board and its motives which the respondent is making in connection with these other cases.

But the present case has not the remotest connection with those cases. Not only is there not a syllable in the record here which suggests any basis for the attack which the respondent makes, but the case itself has absolutely nothing to do with any issue as to whether the respondent will continue in business. It involves nothing but the question whether the respondent's change of name to North American was proper. There is not even a suggestion, in this record or in the

^{11a} Respondent's brief incorrectly states the Court of Appeals No. for the first of these cases as 12947.

Board's opinion, that there is anything illegal in the respondent's mode of doing business.

The real "background" of this case is simply this: Among the irregular carriers a problem arose involving confusion to the public from the use of various names which the Board had to attempt to straighten out through the appropriate exercise of its regulatory power. Pet. Br., p. 8. The Board leaned over backward to avoid interfering with names actually in use save where a Section 411 case would be made out, after notice and hearing. *Idem.* One other such case has been decided by the Board, with an opinion which discloses the obvious public interest in the question. *Id.* at p. 28, par. (a) in n. 19. Only recently, in a decision greatly enlarging the scope of the authority of irregular carriers, and permitting even scheduled operations within certain limits, the Board again referred to the problem, saying:

"In view of the enlarged authority, the public interest requires that safeguards be established to prevent confusion in the minds of travelers as to the identity of the carrier with whom they are arranging for transportation. Such confusion can result from the fact that some supplemental air carriers have names or operate under names similar to those of certificated carriers. We shall therefore provide, as a condition to the exercise of the authority contemplated herein, that an applicant whose name is similar to that of a certificated carrier shall change its name."¹²

Indeed, so careful is the Board that, on reconsideration of this decision, it provided that it would not impose the foregoing as a condition to operating author-

¹² Large Irregular Air Carrier Investigation, CAB Order No. E-9744 (Mimeo.), November 15, 1955, p. 31.

ity, but would rely on notice and hearing procedures under Section 411 which "is designed to correct this very mischief and is ample in scope to meet the problem involved." The Board insists upon following the full Section 411 procedure even in a case where one carrier uses the name "Capitol Airways" whereas one of the certificated carriers is named "Capital Airlines".¹³

The "background", then, is nothing more than the Board's determination to apply Section 411 so as to protect the travelling public from confusion, and has not the remotest connection with some alleged plot to drive anyone out of business. The respondent conjures up such a plot in connection with other cases, now pending in the Court of Appeals, as a result of which it will ultimately be determined whether and on what basis the respondent will continue in business. That question—important as it is to the respondent and to the principles which are to govern the administration of the Act in other connections—should not be permitted to obscure the issue in the present case. For here are questions under Section 411, affecting the travelling public in its daily contact with all types of carriers, the answer to which will determine whether the Board is or is not to have power to eliminate conditions which cause the traveller incalculable trouble, expense, and inconvenience in trying to get where he wants to go on the airline of his choice.

¹³ Supplemental Opinion on Reconsideration, Large Irregular Air Carrier Investigation, CAB Order No. E-9884 (Mimeo.), December 29, 1955, p. 20.

No. 110

IN THE
Supreme Court of the United States

October Term, 1955

AMERICAN AIRLINES, INC.,

Petitioner,

v.

NORTH AMERICAN AIRLINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE
Supreme Court of the United States

October Term, 1955

No. 410

AMERICAN AIRLINES, INC.,
Petitioner,

v.

NORTH AMERICAN AIRLINES, INC.,
Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ~~FIRST CIRCUIT~~**

District of Columbia Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Appendix to Petition and R411-435) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 23, 1955. (R411) No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Acting under Section 411 of the Civil Aeronautics Act of 1938, as amended, 49 U.S.C. §491) did the Civil Aeronautics Board have jurisdiction to enter an order directing respondent North American Airlines, Inc., operating in air transportation in competition with petitioner American Airlines, Inc., to cease and desist from using the name "North American Airlines, Inc.," "North American Airlines", "North American", or any combination of the word "American"?

STATUTE INVOLVED

Section 411 of the Civil Aeronautics Act, 52 Stat. 103 (1938) as amended 66 Stat. 628 (1952), 49 U.S.C., Section 491 reads as follows:

"The [Civil Aeronautics] Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition."

STATEMENT

Petitioner American Airlines, Inc., and its predecessor, American Airways, Inc., have engaged in air transportation since 1930. (R-662). Since April, 1951, respondent has engaged in air transportation under the names North American Airlines and North American Airlines, Inc. (R-1, 220, 309). Petitioner and respondent compete in air transportation. In a proceeding under Section 411 of the Civil Aeronautics Act, *supra*, instituted by the Board's Order of Investigation (R-3), in which petitioner was permitted to intervene (R-6-7), an order (R-229-230) was issued by the Civil Aeronautics Board directing:

"Respondent and its successors, assignees, representatives, agents, officers and employees to cease and desist from engaging in air transportation under the names 'North American Airlines, Inc.'; 'North American Airlines'; 'North American', or any combination of the word 'American'."

The order of the court below reversed the order of the Civil Aeronautics Board.

ARGUMENT

1. The decision of the Court of Appeals correctly reversed the order of the Civil Aeronautics Board on the ground that that Agency, on the basis of the evidence and of the Congressional intent of section 411, was without jurisdiction to enter it.

The court correctly concluded (a) that the evidence did not support a finding that respondent's use of the words North American constituted an unfair or deceptive practice or unfair method of competition of which the Board had jurisdiction under section 411 and; (b) that the Board, under section 411 had no jurisdiction to adjudicate

questions of private rights arising in the field of trademarks and trade names. (Appendix to Petition p. xvi).

(a) The evidence in support of the Board's finding, essential to validity of its order, that "the substantial public confusion found herein is likely to continue" (R 210) as summarized on the basis of "examination of the record and exhibits" by the court below (App. to Pet. pp. iv-v); is as follows:

"(1) some North American passengers with North American tickets in their hands presented themselves at American ticket counters; (2) some people intending to meet North American passengers called American Airlines 'information' or ticket counters to ask about the arrival of North American flights; (3) some people who heard North American radio advertising of deferred payment flight plans called American Airlines for particulars as to how North American's 'fly now—pay later' program operated; American offered no such plan; (4) 'persons having business' were (a) a painter's union official who telephoned to American to protest that a sign was being painted by non-union painters but was assured this was a North American sign; (b) a hotel in Kansas City where North American had 'hotelled' its passengers sent its bill to American; (c) a radio repair service telephoned to American about a North American bill for \$13; (d) a tailor who addressed a North American tailoring charge for \$18 to American although the street number was that of North American; (5) the Post Office misdelivered to American (a) one correctly addressed envelope intended for North American; (b) the tailor bill mentioned in (4)(d) above; (c) in Burbank where both lines had ticket counters at the terminal, a witness said some 6 to 12 envelopes came to the American ticket counter but were intended for the North American counter; (6) a robbery of a North American ticket office was described in the newspapers as having occurred at American's office."

As further found by the court, there was no evidence that respondent adopted its name with intent to deceive

the public or trade upon the goodwill or business reputation of petitioner or that petitioner had been injured by respondent's operation; that respondent palmed itself off as petitioner; that respondent "confused" petitioner's passengers to petitioner's disadvantage; that respondent's advertising intended to or did entice petitioner's passengers to fly on respondent or that respondent flew a single passenger who thought he was contracting to fly on petitioner or; that petitioner was harmed otherwise than by competition afforded by any irregular carrier. (App. to Pet. pp. vi-vii).

The court quoted (App. to Pet. p. v) from the dissenting opinion of Board Member Adams:

"Since American Airlines, Inc., carries approximately 5 and 1/2 million passengers each year over its system, I am not impressed with the fact that witnesses in this case (principally those employed by American Airlines itself) have testified that some confusion has existed. . . . On the contrary, I would be greatly surprised, (in view of the several million phone calls and other communications which American Airlines receives every year over and above those received from passengers which it actually carries), if there were not SOME demonstrable public confusion. . . ."

The court concluded its review of the evidence with the statement:

"In short, the public may have benefitted, so far as the record shows, and in any event, there is no demonstration that North American affirmatively acted in violation of a statute within the jurisdiction of the Board."

The ^{Court's} Board's reference at page 20 of its Opinion (App. to Pet. p. xvii) to the recent amendment to the Civil Aeronautics Act extending the provisions of section 411 to 'ticket agents' is an aid in determining the type of unfair practice or competitive method which the court concluded was of such a "public" nature as to fall within

the contemplation of section 411.¹ The evidence in this case disclosed no such situation. Included by the amendment are practices which would induce members of the public to believe that a ticket agent was an air carrier; misleading advertising as to quality and kind of service; type and size of aircraft, departure and arrival times, points served, routes followed, stops to be made and elapsed time; failure to adhere to published tariff rates; discrimination between passengers, collecting improper charges; the sale of reserved space by ticket agents having no commitment from a carrier for such space; false representations concerning insurance coverage, "special priorities," special discounts; failure to make proper refunds. Practices of this type, as the court explained, are "each of the sort for which a public body might be expected to provide a remedy in the public interest where resort by an individual to the courts would be largely fruitless or impracticable." (App. to Pet. pp. xvii-xviii).

In further support of its position that the evidence in this case did not sufficiently support any practice prohibited by section 411, the court referred to many leading Supreme Court cases (App. to Pet. xix-xx). In general, these opinions disclose that practices forbidden by sections 5 of the Federal Trade Commission Act and consequently of a type prohibited by section 411, are those which may be presumed to have a generally adverse economic effect through ~~their tendency~~ to suppress competition or those practices, whether amounting to deception or to something less, which are contrary to established public policy. See *Federal Trade Commission v. Keppel and Bro.* 291 U.S. 304, 54 S. Ct. 423 (1934).

Reference to the recent amendment concerning ticket agents and to leading Supreme Court cases was used in part, in the court's opinion, as a yardstick against which

¹ Act of July 14, 1952. 49 U.S.C. Section 491 (1952).

to appraise the sufficiency of the evidence to establish the type of violation which section 411 was designed to prohibit. The evidence simply fell short of showing the type of situation of which the Board was given jurisdiction by that section.

(b) With respect to the proper meaning, purpose and intent of section 411, the court examined the legislative history of the Civil Aeronautics Act and of that section (App. to Pet. pp. vii-x). It concluded *inter alia* (1) that the Board "in the interest of the public," not in furtherance of the private interests of one entity as against another, was empowered to deal with unfair practices or unfair methods of competition," (App. to Pet. p. ix), and (2) "that the section, substantially identical to section 5 of the Federal Trade Commission Act," was intended to carry with it, "the body of law which had grown up around it [Section 5]."

The court then cites judicial authority for its position that it is not a proper function of the Civil Aeronautics Board, under section 411, to adjudicate private rights; that its proper function is to prevent unfair and deceptive practices and unfair methods of competition in air transportation involving a specific and substantial public interest. (App. to Pet. pp. x-xii). In private actions, not arising under statutes comparable to section 411, factors would have to be considered, the court finds, which differ from the public interest criteria which must dictate decision under section 411 (App. to Pet. pp. xii-xv). Referring to the Board's brief below, which, as the court states, points out that "petitioner's name is differentiated from intervenor only by the addition of a one syllable prefix" (App. to Pet. p. xiii), the court cites the supporting cases referred to by the Board, as well as opposing cases involving situations of the same type (App. to Pet. pp. xiii-xiv), briefly discussing the special problem raised by those involving such geographical words as: "Columbia"; "American", "United States", "Minnesota", and "Min-

neapolis", and points out in the field of air transportation the longstanding prevalence of close similarity in carrier names. (App. to Pet. p. xv).

Referring further to litigation of the private adversary type involving name similarity, the court quotes from *Eastern Wine Corp., v. Winslow Warren Ltd.*, 137 F. 2d 955, 960 (2d Cir. 1943), *cert. denied*, 320 U.S. 758 (1943):

"The issue in such a case as this is 'whether an appreciable number of prospective purchasers of the goods * * * are likely' to be confused. 'That a few particularly undiscerning prospective purchasers might be misled is not enough.'"

And further, from the Court's Opinion:

"Even in such adversary litigation between competitors, the obligation resting upon one is not to insure that every purchaser will distinguish it from its competitor, but only to use 'reasonable means to prevent confusion.' *Keillogg Co. v. National Biscuit Co.*, 305 U.S. 111, 121, (1938). 'A new competitor is not held to the obligations of an insurer against all possible confusion.' He is not obligated to protect the negligent and inattentive purchaser from confusion resulting from indifference. *Skinner Mfg. Co., v. General Foods Sales Co., Inc.*, D.C. 52 F. Supp. 432, 433, 450. It has been said that he is not required to make the market 'foolproof.' [Citing cases]. '* * * instead, they are required only to mark or designate them in such manner that purchasers exercising ordinary care to discover whose products they are buying will know the truth and not become confused or mistaken. * * *'" *Life Savers Corp., v. Curtiss Candy Co.*, 182 F. 2d 2, 8 (7th Cir., 1950). See also, *McGraw-Hill Pub. Co., v. American Aviation Associates*, 73 App. D. C. 131; 117 F. 2d 293 (D. C. Cir. 1940)."

Referring to petitioner and respondent, viewed from a private trade name standpoint, the court states:

"Phonetic differences, lack of emphasis in petitioner's use of the disputed term, possible failure of the in-

tervenor's advertising campaigns, differences in service, rates and elements of the airlines traveling public each has sought to reach, would seem to serve here to distinguish the two competing companies."

The court, partly on the basis of the foregoing, recognizing the complicated character of issues arising in such private trade-name litigation, was of the opinion that Congress, having no authority in any event, to legislate on the substantive law of trade marks, would not be likely to vest in the Civil Aeronautics Board authority to decide such cases. (App. to Pet. p. xvi).

This proceeding has in fact been conducted from its inception as one to enforce a private right of petitioner. At the hearing before the Civil Aeronautics Board that agency introduced no evidence whatsoever. All evidence was introduced by petitioner. Petitioner alone seeks review by this court. Neither the Board nor the Attorney General is supporting or opposing certiorari. The court below was clearly correct in holding that the Board has no jurisdiction over cases involving private rights in the field of trade marks.

2. The court below did not hold that a violation of section 411 required a showing of (1) "deliberate intention to deceive" or a "palming off" (Petition, p. 18), or (2) "injury to competitor" (Petition, p. 21).

The court below examined the record and reviewed the evidence (App. to Pet. p. iv, vi). It found *inter alia* that there was no evidence of intent to deceive the public, of "palming off", or of injury to petitioner. Entirely on the basis of the fact that there was no such evidence petitioner has somehow arrived at the conclusion that the court has held that it was essential, i.e., that proof of "deliberate intent to deceive," "palming off" (Pet. p. 18) and injury to a competitor (Pet. p. 21) are essential to proof of violation of section 411. The position of the

court below could hardly have been less aptly analyzed or more inaccurately interpreted. Throughout its opinion the court proceeds on the thesis that section 411 is concerned with a specific and substantial public interest, i.e., generally, injury or damage to the public. It was in developing the failure of the evidence to meet this test that the court reviewed it. That this was the court's purpose is quite apparent from its entire opinion; but more specifically, it concludes the very paragraph containing everything on which petitioner relies with these words:

"In short the public may have benefited so far as the record shows. . . ." (App. to Pet. p. vii)

There is nothing in the opinion of the court below to support petitioner's contention that that court has held that a violation of section 411 requires proof of intent to deceive, "palming off" or injury to a competitor.

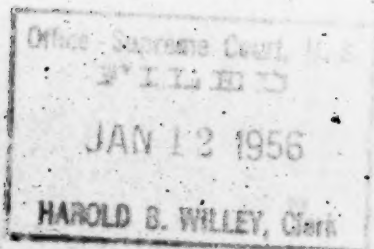
CONCLUSION

The decision of the court below is correct. The petition for a writ of certiorari presents no question warranting further review and should be denied.

Respectfully submitted,

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Attorneys for Respondent.

October 31, 1955



No. 410

In the Supreme Court of the United States

OCTOBER TERM, 1955

AMERICAN AIRLINES, INC., PETITIONER

v.

NORTH AMERICAN AIRLINES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT CIVIL AERONAUTICS BOARD

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BRIEF FOR RESPONDENT CIVIL AERONAUTICS BOARD¹

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (R. 411-433) is not yet reported. The opinion and order of the Civil Aeronautics Board (R. 199-230) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1955 (R. 437). The petition

¹ Although the Civil Aeronautics Board did not file a petition for certiorari in this case and therefore is a respondent, it is of the view that the decision below, invalidating the Board's order, is erroneous. This brief accordingly supports the position taken by petitioner.

for a writ of certiorari was filed on September 21, 1955, and was granted on November 14, 1955 (R. 438). The jurisdiction of this Court rests on 28 U. S. C. 1254.

QUESTIONS PRESENTED

1. Whether it is an "unfair or deceptive practice" or an "unfair method of competition" condemned by Section 411 of the Civil Aeronautics Act for an air carrier to use a trade name which, because of its similarity to that of a competing carrier, is likely to cause substantial public confusion.

2. Whether the public interest in eliminating such confusion justified the Board in ordering the carrier to cease using such trade name.

STATUTES INVOLVED

Section 411 of the Civil Aeronautics Act, 52 Stat. 1003, as amended, 66 Stat. 628, 49 U. S. C. 401, provides as follows:

The [Civil Aeronautics] Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after

notice and hearing, that such ~~air~~ carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition.

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended; 52 Stat. 112, 66 Stat. 632, 15 U. S. C. 45, provides in relevant part:

SEC. 5: (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

* * * * *

(6) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue * * * a complaint

stating its charges * * *. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall make a report in writing * * * and shall issue * * * an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice.

STATEMENT

North American Airlines, Inc. ("North American") is a large irregular air carrier which holds operating authority from the Civil Aeronautics Board under its original name, Twentieth Century Airlines, Inc. (R. 220). Since 1951, however, it has used the names North American and North American Airlines in providing air transportation services between New York, Chicago, and Los Angeles (*ibid.*). These services are competitive with those of American Airlines ("American"), a certificated carrier which has conducted scheduled operations since 1930 under its name and that of its predecessor, American Airways (*ibid.*).

In October 1952, North American applied to the Board pursuant to the latter's Business Name Regulation, for permission to use the name North American Airlines, Inc. (R. 1). That regulation (R. 295-298) provides that, in the absence of specific authorization, air transportation services

may be provided only in the name contained in an air carrier's operating authority. It further provides that permission to use another name, which a carrier has used to develop good will, will be denied only if its continued use would constitute an unfair or deceptive practice or an unfair method of competition within the purview of Section 411 of the Civil Aeronautics Act.

American opposed the application on the ground that use of the North American name violated Section 411 (R. 5). The Board thereupon instituted an investigation to determine whether North American was violating Section 411. This investigation was consolidated with North American's application for change of name (*ibid.*). The only issue in the consolidated Board proceeding was whether North American was violating Section 411.

After full administrative proceedings (including public hearings, an initial decision by the examiner, and oral argument before the Board, R. 200), the Board held, as had the examiner, that North American's use of the name "North American Airlines" constituted an unfair or deceptive practice and an unfair method of competition in violation of Section 411 (R. 210-211), and ordered North American to cease and desist using such name (or any abbreviation or combination thereof with the word "American") (R. 229). This conclusion rested on findings that North Amer-

ican's use of that name had resulted in "substantial public confusion" between itself and its long-established competitor, American Airlines (R. 201, 205); that such^o confusion was "likely to continue" (R. 210); and that the public interest required its elimination (R. 208-209). The Board stated (R. 202) that the bulk of the confusion shown by the record was on the part of persons who were actual or prospective purchasers of air transportation, but that other members of the public, including persons meeting passengers, creditors, labor unions, and the press, had also been confused.

The Board described the public interest to be served by its cease-and-desist order as follows (R. 208-209):

* * * the record is convincing that the public interest requires this action in order to prevent further public confusion between respondent and intervenor due to similarity of names. The maintenance of high standards in dealing with the public is expected of common carriers, and the public has a right to be free of the inconveniences which flow from confusion between carriers engaging in the transportation of persons by air. The speed of air travel may well be diminished when passengers check in for flights with the wrong carrier, or attempt to retrieve baggage from the wrong carrier, or attempt to purchase transportation from the wrong car-

rier, or direct their inquiries to the wrong carrier. Friends, relatives or business associates planning to meet passengers or seeking information on delayed arrivals are subject to annoyance or worse when confused as to the carrier involved. The proper handling of complaints from members of the public is impeded by confusion as to the carrier to whom the complaint should be presented. The transportation itself may differ from what the confused purchaser had anticipated (e. g., in terms of equipment), even though the time and place of arrival may be about the same. It is obvious that public confusion between air carriers operating between the same cities is adverse to the public interest, and we have determined that the public should be protected from the effects of the confusion shown on the record by eliminating what we find to be the cause of such confusion.

Upon review sought by North American, the court of appeals reversed the Board's order on the ground that the Board had applied "criteria which fell short of the public interest findings demanded by the law" (R. 418). The court held that the use of the name "North American" "without more * * * is not the unfair practice or the unfair method of competition over which the Board, in the public interest, has jurisdiction" (R. 430), and that "protection by the Board of a name monopoly * * * is far outside the

scope of the powers entrusted to the Board" (R. 432). The court stressed (R. 417-418) the absence of any evidence showing (1) that North American had adopted its name with deliberate intent to deceive the public or (2) that use of that name had caused American Airlines competitive injury.

SUMMARY OF ARGUMENT

I

The court of appeals set aside the Board's order enjoining respondent from using the name "North American" on the ground that an air carrier's use of a trade name which tends to confuse the public because of its similarity to the trade name of a competing carrier is not, "without more," an "unfair or deceptive practice" or an "unfair method of competition" which the Board may prohibit under Section 411 of the Civil Aeronautics Act. It is well settled, however, by cases arising under the like provisions of Section 5 of the Federal Trade Commission Act (upon which Section 411 was modeled) that it is an unfair or deceptive practice to use a trade name which, because of its similarity to that of a competitor, has the tendency or capacity to deceive or confuse the public. These cases emphasize that there is a public interest in protecting the public from the confusion which use of such a trade name may engender and that, accordingly, there is no need

to find an intent to deceive or injury to competitors.

The foregoing principles are equally applicable in determining whether air carrier practices are unfair or deceptive under Section 411 of the Civil Aeronautics Act. An air carrier's use of a trade name which causes public confusion is, "without more," a violation of Section 411, and the Board is not required to find, additionally, an intent to deceive or competitive injury. Public confusion is no less harmful in air transportation than in those areas of interstate commerce which are within the Federal Trade Commission's regulatory jurisdiction. And the Board, the expert agency created by Congress to regulate all aspects of air transportation, has power, under Section 411, to deal with unfair practices by air carriers which is at least as great as that of the Trade Commission to deal with unfair practices in other industries pursuant to Section 5.

II

The Board made detailed findings showing that respondent's use of the name "North American" not only has the inherent propensity to confuse the public, but has actually caused substantial public confusion. These findings were not disturbed by the court of appeals and they rest upon substantial evidence. They leave no doubt that here there is a "specific and substantial" public interest in appropriate remedial action by the

responsible agency. *Federal Trade Commission v. Royal Milling Co.*, 288 U. S. 212, 216-217.

ARGUMENT

The court of appeals set aside the Board's order enjoining respondent from using the name "North American" on the ground that an air carrier's use of a trade name which tends to confuse the public because of its similarity to the trade name of a competing carrier is not, "without more" (R. 430, 432), an "unfair or deceptive practice" or an "unfair method of competition" which the Board may prohibit under Section 411 of the Civil Aeronautics Act. The court apparently held (see R. 417-418) that the public interest which is a prerequisite to Board action under that Section would be satisfied only if it also appeared (1) that the trade name had been adopted in order to deceive the public, or (2) that use of the name had resulted in competitive injury to the other carrier. The court did not upset the Board's findings as to the character and extent of public confusion resulting from the similarity between the names "North American" and "American"; it held only that these findings were insufficient to support the order because the Board had applied "criteria which fell short of the public interest findings demanded by the law" (R. 418).

We shall urge in Point I that an air carrier's use of a trade name which results in substantial public confusion does constitute an "unfair or

deceptive practice" or an "unfair method of competition" which the Board is authorized to prohibit in the public interest, without regard to whether such name was adopted with intent to deceive the public, or whether its use has resulted in competitive injury. In Point II we shall show that the Board's findings in this case support its conclusion that respondent's use of the name "North American" resulted in substantial public confusion, and that the public interest fully justified the Board's cease-and-desist order.

I

Section 411 authorizes the Board to prohibit an air carrier from using a trade name which, because of its similarity to that of another air carrier, causes substantial public confusion

As the court of appeals recognized (R. 422), Section 411 of the Civil Aeronautics Act (*supra*, p. 2) was modeled after Section 5 of the Federal Trade Commission Act (*supra*, p. 3) and contains substantially identical provisions.² Since

² Both sections prohibit "unfair methods of competition" and "unfair or deceptive practices"; § 5 also prohibits unfair or deceptive "acts." In proceedings under § 5 it must "appear to the [Federal Trade] Commission that a proceeding by it * * * would be to the interest of the public"; under § 411 the Board may proceed "if it considers that such action by it would be in the interest of the public." Section 411 authorizes complaints by air carriers to the Board concerning violations thereof, while § 5 contains no provision for complaints to the Trade Commission.

this is the first case under Section 411 to come before the courts, the decisions construing the similar language of Section 5 provide an appropriate guidepost for interpreting Section 411.

Section 5, like Section 411, condemns "unfair and deceptive practices" and "unfair methods of competition." Congress did not "confine the forbidden methods to fixed and unyielding categories" (*Federal Trade Commission v. Keppel & Bro.*, 291 U. S. 304, 310), and the practices which Section 5 outlaws " * * * are not confined to those that were illegal at common law or that were condemned by the Sherman Act. * * * Congress advisedly left the concept flexible to be defined with particularity by the myriad of cases from the field of business." *Federal Trade Commission v. Motion Picture Advertising Service Co.*, 344 U. S. 392, 394.

It is well settled that use of a trade name which, because of its similarity to that of a competitor, has the tendency or capacity to deceive or mislead the public is an "unfair or deceptive act or practice" and an "unfair method of competition" which the Commission can prohibit under Section 5. *Juvenile Shoe Co. v. Federal Trade Commission*, 289 Fed. 57, 59 (C. A. 9), certiorari denied, 263 U. S. 705; *Federal Trade Commission v. Balme*, 23 F. 2d 615, 621 (C. A. 2), certiorari denied, 277 U. S. 598; *Pep Boys v. Federal Trade Commission*, 122 F. 2d 158, 161 (C. A. 3); *Galter v. Federal Trade Commission*, 186 F. 2d 810

(C. A. 7), certiorari denied, 342 U. S. 818.* The reason why the public interest requires the suppression of such names is clear: "The consumer is prejudiced if upon giving an order for one thing, he is supplied with something else. * * *. In such matters, the public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance." *Federal Trade Commission v. Algoma Lumber Co.*, 291 U. S. 67, 78; see, also, *Federal Trade Commission v. Royal Milling Co.*, 288 U. S. 212, 217.

Since the interest to be protected by a cease-and-desist order directed against such practices is the public's right to be free from confusion, the Commission is not required to find either "a deliberate effort to deceive" or "actual deception" of the public. *Pep Boys* case, *supra*; *Balme* case, *supra*; cf. *Federal Trade Commission v. Algoma Lumber Co.*, 291 U. S. 67; *Federal Trade Commission v. Keppel & Bro.*, 291 U. S. 304, 309; *Charles of the Ritz v. Federal Trade Commission*, 143 F. 2d 676, 680 (C. A. 2).⁴

* The Federal Trade Commission has regularly issued cease-and-desist orders against use of such trade names.

⁴ Indeed, even under the private law of unfair competition, a showing of likelihood of confusion between names may be sufficient to obtain injunctive relief, even though there is no intention to deceive. See, e. g., *Coty, Inc. v. Parfums de Grande Luxe*, 298 Fed. 865, 870 (C. A. 2), certiorari denied, 266 U. S. 609; *Photoplay Pub. Co. v. LaVerne Pub. Co.*, 269 Fed. 730, 732-733 (C. A. 3); *S. S. Kresge Co. v. Champion Spark Plug Co.*, 3 F. 2d 415, 419 (C. A. 6); *Manitowoc*

Similarly, the Commission is not required to show injury to competitors. Prior to 1938, when Section 5 prohibited only "unfair methods of competition," the Commission was required to show, in order to establish violation, that the unfair methods were injurious to competitors, although a showing of specific losses to particular competitors was not required. *Federal Trade Commission v. Raladam Co.*, 283 U. S. 643, 316 U. S. 149, 152. But in 1938 Section 5 was amended by the Wheeler-Lea Act (52 Stat. 111) to expand the prohibition to cover "unfair or deceptive act or practice." This change in the statute, which was made contemporaneously with the passage of the Civil Aeronautics Act, was designed for the very purpose of halting practices "unfair or deceptive to the public generally, * * * regardless of their effect upon competitors." S. Rep. No. 221, 75th Cong., 1st sess., p. 2. [Emphasis added.]

We submit that the foregoing principles developed under Section 5 are equally applicable in determining whether air carrier practices are unfair or deceptive under Section 411 of the Civil Aeronautics Act. An air carrier's use of a trade

Pea-Packing Co. v. Numsen & Sons, 93 Fed. 196, 197 (C. A. 7); *Lane Bryant, Inc. v. Maternity Lane Ltd.*, 173 F. 2d 559, 564 (C. A. 9). For additional cases, see collection in 16 C. F. R., Part 3, §§ 3.2240 and 3.2245. Such a finding is also the statutory test under federal law in trademark infringement cases (15 U. S. C. 1114 (1)). *Admiral Co. v. Penco, Inc.*, 203 F. 2d 517, 520 (C. A. 2).

name which confuses, or tends to confuse, the public is, "without more," a violation of Section 411, and the Board is not required further to find an intent to deceive or competitive injury. Since the object of the statute is prophylactic, cf. *Fashion Originators' Guild v. Federal Trade Commission*, 312 U. S. 457, 466, not punitive, the existence of a purpose to cause harm is beside the point: and since it is for *public* protection, proof that competitors have been damaged is similarly unnecessary. Cf. *Raladam* case, *supra*, 316 U. S. at 152.

Public confusion is no less harmful in air transportation than in those areas of interstate commerce which are within the Trade Commission's regulatory jurisdiction.⁵ Indeed, there is a particularly strong public interest in insuring that air carriers' names do not confuse the public. The primary advantage of air transportation is speed and, as the Board pointed out (R. 208), "[t]he speed of air travel may well be diminished when passengers check in for flights with the wrong carrier, or attempt to retrieve baggage from the wrong carrier, or attempt to purchase transportation from the wrong carrier, or direct their inquiries to the wrong carrier."

It would be anomalous indeed if the Board had less power under Section 411 to deal with unfair

⁵ Section 5 of the Trade Commission Act specifically excepts from the Commission's jurisdiction thereunder "air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938."

practices by air carriers than the Trade Commission has under Section 5 to deal with such practices in industry generally. Unlike the Trade Commission Act, which merely prohibits certain general anti-competitive business practices, the Civil Aeronautics Act provides a "comprehensive scheme" of detailed regulation of both economic and safety aspects of air transportation. *Chicago & Southern Airlines v. Waterman Steamship Corp.*, 333 U. S. 103, 105. The Board, in short, is the expert agency which Congress created to regulate air transportation, and it cannot be said to have acted unreasonably in construing its own statute as conferring powers equal to those of the Trade Commission under the substantially identical provisions of Section 5 of the Trade Commission Act. It correctly held that an air carrier's use of a confusing trade name is an "unfair" practice under Section 411, whether or not such name was designed to deceive or its use has caused injury to competitors.

II

The Board properly found that respondent's use of the name "North American" caused substantial public confusion, and that the public interest required issuance of a cease-and-desist order

The Board found that respondent's use of the name "North American" had caused "substantial public confusion" between itself and petitioner American Airlines (R. 201; see R. 205); that such

confusion was "likely to continue" (R. 210); and that the "public interest requires" cessation of use of that name in order to prevent further public confusion (R. 208). These findings, we submit, were correct and were fully adequate to support the Board's cease-and-desist order.

The Board stated that most of the confusion shown by the record was on the part of persons "reasonably identified as prospective or actual purchasers of air transportation" (R. 202); that confusion was also experienced by persons meeting passengers, by creditors of North American, by the Post Office and by the public press (R. 221-225); and that such confusion was "substantial" (R. 205).⁶ The Board also pointed out (R. 207) that when respondent changed its name in 1951 to "North American," "it was obvious" that the similarity between that name and "American".

⁶ The evidence supporting these findings is summarized by the Board at R. 220-223, and we shall not detail it here. We note in passing, however, that seven American employees described numerous instances of public confusion between American and North American in New York and Los Angeles with which they were personally familiar (R. 201). These instances were not all-inclusive, but merely illustrative (R. 35-36, 68-69, 70, 205). We further note the uncontradicted testimony that McAndrews, North American's president, stated that "many times" passengers who came to the North American ticket counter at the Burbank airport in Los Angeles to purchase their tickets were in fact American passengers, and that, if they were destined for Chicago or New York, "he would do everything he could to steal them" (R. 51-52).

(under which petitioner had been operating a competing service for many years, R. 220) "might well cause confusion,"⁷ as it in fact did.⁸ The confusing similarity of the names themselves, considered in conjunction with the affirmative showing of actual and substantial public confusion, fully supports the Board's conclusion that the confusion would persist in the absence of remedial action.

The Board also explained in detail why the public interest requires elimination of confusion as to the identity of carriers. It pointed out (R. 208) that the public has the "right to be free of the inconveniences which flow from confusion" between air carriers; that the speed of air travel may be diminished when passengers are confused as to where to check in for flights, to retrieve baggage or to purchase tickets; that persons meeting passengers or seeking information on delayed arrivals are subject to "annoyance or worse" when confused as to the carrier involved; that, for the same reason, the proper handling of public complaints is "impeded"; and that, if there is confusion of identity, the transportation provided may be different (*e. g.*, in terms of equipment) from what the traveler anticipated. The Board concluded (R. 209) that "public confusion between

⁷ The Board also found in this connection, that respondent's use of a "confusingly similar name was not accidental or inadvertent; but rather was knowing" (R. 207).

⁸ The addition of a one-syllable prefix, such as "North," is often insufficient to avert public confusion. See, *e. g.*, *American Thread Co. v. North American Thread Co.*, 33 F. Supp. 616 (S.D. N. Y.).

air carriers operating between the same cities is adverse to the public interest," and that "the public should be protected from the effects of the confusion shown on the record by eliminating what we find to be the cause of such confusion," namely, respondent's use of the name "North American."⁹

These considerations, we submit, fully establish the "specific and substantial" public interest which the statute apparently requires as a condition of Board action. Cf. *Federal Trade Commission v. Klesner*, 280 U. S. 19, 28. Unlike the situation in *Klesner*, where the Trade Commission was held to have no jurisdiction because the case involved only a trivial controversy between two window-shade stores in the District of Columbia, the Board proceeding here involves considerably "more than a mere private controversy" between the two carriers. *Federal Trade Commission v. Keppel & Bro.*, 291 U. S. 304, 309. On the findings—which are fully supported by the record and which were not disturbed by the court of appeals—it is plain that the practice may cause inconvenience or burden to a substantial segment of the public and that it is sufficiently "far reaching in its consequences [to be] of public concern * * *" (*ibid.*). As this Court has long since recognized, there is a "specific and substantial" public interest in protecting the public

⁹ Note that the Civil Aeronautics Act's declaration of policy, appearing in Section 2 (49 U. S. C. 402), as well as Section 411, emphasizes that the prevention of unfair practices (see Section 2 (c)) is "in the public interest" and constitutes a responsibility committed to the Board.

against the "deception" which results from the use of misleading and confusing trade names. *Federal Trade Commission v. Royal Milling Co.*, 288 U. S. 212, 216-217.¹⁰

¹⁰The court of appeals appears to have been of the view that the Board was attempting to adjudicate a private trade name dispute between the two carriers—a function which, the court ruled, Congress did not commit to the Board. See, e. g., its statement (R. 429) that "it is utterly unlikely that Congress constituted the Board a forum to adjudicate the complicated issues arising in this field [unfair competition]." The opinion of the Board shows, however, that the touchstone of its decision was the public interest, not private injury; the Board did not even consider whether American had been competitively injured by respondent's use of the name "North American."

Furthermore, it is not clear that Congress did not intend to give the Board jurisdiction to adjudicate private disputes between air carriers involving unfair competitive practices which adversely affect the public interest. Section 411 of the Civil Aeronautics Act, unlike Section 5 of the Federal Trade Commission Act, specifically authorizes the filing of complaints with the Board. Moreover, private disputes between air carriers involving other areas of the Board's regulatory power have been held to be within the Board's primary jurisdiction to determine issues calling for its expert judgment (see, e. g., *S. S. W. Inc. v. Air Transport Ass'n of America*, 491 F. 2d 658 (C. A. D. C.), certiorari denied, 343 U. S. 955; *Slick Airways v. American Airlines*, 107 F. Supp. 199 (D. N. J.), certiorari denied, 346 U. S. 806), and the same rule may apply in this area.

To whatever extent the decision below may rest upon this Court's dictum (*American Steel Foundries v. Robertson*, 269 U. S. 372, 381; *American Trading Co. v. Heacock Co.*, 285 U. S. 247, 256) that Congress has "been given no power to legislate upon the substantive law of trademarks" (R. 427, 429), it is further in error. While Congress has not been given specific power to regulate that subject, it may do so in the exercise of the commerce power. *T. U. Hurst & Son v. Federal Trade Commission*, 268 Fed. 874, 877 (E. D. Va.);

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Federal Trade Commission v. Lorillard Co., 283 Fed. 999, 1002-1003 (S. D. N. Y.), affirmed, 264 U. S. 298; *Ford Motor Co. v. Federal Trade Commission*, 120 F. 2d 175, 183 (C. A. 6), certiorari denied, 314 U. S. 668; *Philco Corp. v. Phillips Manufacturing Co.*, 133 F. 2d 663 (C. A. 7); *S. C. Johnson & Son v. Johnson*, 175 F. 2d 176, 178 (C. A. 2), certiorari denied, 338 U. S. 860. See also *Steele v. Bulova Watch Co.*, 344 U. S. 280. The commerce power was the basis upon which Congress enacted the substantive provisions of the Lanham Trademark Act (60 Stat. 427, 15 U. S. C. 1051 *et seq.*). S. Rep. No. 1333, 79th Cong., 2d sess., U. S. Congressional Service, pp. 1274, 1277. See also H. Rep. No. 3147, 58th Cong., 3d sess., reprinted in 17 J. Patent Office Soc. (1935), 122, 124.

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IN THE
Supreme Court of the United States

October Term, 1955

AMERICAN AIRLINES, INC., *Petitioner,*

v.

NORTH AMERICAN AIRLINES, INC., *Respondent.*

On Writ of Certiorari to the United States Court of
Appeals for the District of Columbia Circuit

BRIEF FOR THE RESPONDENT

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IN THE
Supreme Court of the United States

October Term, 1955

AMERICAN AIRLINES, INC., *Petitioner*,

v.

NORTH AMERICAN AIRLINES, INC., *Respondent*.

On Writ of Certiorari to the United States Court of
Appeals for the District of Columbia Circuit

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit, not yet reported, appears at pages 411-435 of the Record. The opinion of the Civil Aeronautics Board appears at pages 199-211 of the Record and the dissenting opinion of one Board Member at pages 211-218 of the Record. The initial decision of the Hearing Examiner appears at pages 183-199 of the Record.

JURISDICTION

The judgment of the Court of Appeals was entered on June 23, 1955 (R. 437). The petition for writ of certiorari was filed on September 21, 1955, and was granted on November 14, 1955. The jurisdiction of this Court is based on 28 U. S. C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether a determination by the Civil Aeronautics Board under Section 411 of the Civil Aeronautics Act, that the issuance of an order enjoining an alleged unfair trade practice is "in the interest of the public," is subject to judicial review.

2. Whether a controversy centering around protection of a trademark or trade name owner against use by a competitor of an allegedly confusingly similar trade name involves "a specific and substantial public interest".

3. Whether, assuming the last question were answered in the affirmative, the lower court was correct in stating that the Civil Aeronautics Board erred in ordering complete excision of any reference to the common term "American" in respondent's corporate name while giving no consideration whatsoever to the possibility of a less drastic remedy.

STATUTE INVOLVED

Section 411 of the Civil Aeronautics Act, 52 Stat. 1003 (1938), as amended 66 Stat. 628 (1952), 49 U. S. C. Sec. 491, reads as follows:

"The [Civil Aeronautics] Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier or

ticket agent to cease and desist from such practices or methods of competition."

Pertinent excerpts from the similar Section 5 of the Federal Trade Commission Act are printed in the footnote.¹

COUNTERSTATEMENT OF THE CASE.

Respondent, North American Airlines, Inc., originally incorporated as Twentieth Century Airlines, Inc., on May 4, 1946, in the State of North Carolina, holds a letter of registration as a large irregular air carrier issued in that name by the Civil Aeronautics Board issued July 22, 1947 (R. 171). Since April 21, 1951, respondent has engaged in air transportation under the trade name North American Airlines and North American, and on March 3, 1952, by an amendment to its certificate of incorporation, respondent changed its name to North American Airlines,

¹"Sec. 5 (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

"The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

"(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue . . . a complaint stating its charges . . . Any person, partnership, or corporation may make application; and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. . . . If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this act, it shall make a report in writing . . . and shall issue . . . an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice." 38 Stat. 719 (1914), as amended, 52 Stat. 111 (1938), 52 Stat. 1028 (1938), 64 Stat. 21 (1950), 66 Stat. 632 (1953), 15 U.S.C. Sec. 45.

Inc. (R. 171). By a letter dated March 11, 1952, addressed to the Civil Aeronautics Board, respondent advised the Civil Aeronautics Board of the change of its corporate name and suggested a reissue of its letter of registration in that name (R. 171-172). At that time there was no Board regulation which purported to control or regulate the name under which a carrier might operate and no regulation requiring Board approval or permission to change a carrier's name. The Board did not reply to respondent's letter of March 11th, and more than five months later, on August 19, 1952, it adopted Regulation Serial No. ER-178, being Amendment No. 7 to Part 291 of its economic regulations under which it is made an express condition upon the operating authority granted to each large irregular carrier that unless otherwise authorized by the Board, such air carrier shall not hold out to the public and perform air transportation services in any name other than that appearing in its letter of registration. 14 C. F. R. § 291.28 (R. 295-297). In the introductory comment to its new regulation the Board states that where good will has been established in a name, the Board will deny permission to use that name only where, after notice and opportunity for a hearing, it is established that such use constitutes a violation of Section 411 of the Civil Aeronautics Act of 1938, 52 Stat. 1003, as amended 66 Stat. 628, 49 U. S. C. Sec. 491 (R. 295-297). On October 6, 1952, respondent, in accordance with the requirements of the new regulation, applied to the Board for authorization to conduct its operations under its proper corporate name, *i. e.*, North American Airlines, Inc. (R. 1-3).

After respondent filed said application petitioner² filed a memorandum with the Civil Aeronautics Board claiming

² Petitioner is an air carrier which together with its predecessor company, American Airways, Inc., has been continuously engaged in air transportation since 1930 (R. 171).

service mark infringement and unfair competition (R. 186). By its Order Serial No. E-7107, adopted on January 28, 1953, the Civil-Aeronautics Board instituted an investigation, C. A. B. Docket No. 5928, to determine whether respondent in using its corporate name and derivatives thereof in air transportation, "has been and is" violating Section 411 of the Civil Aeronautics Act, *supra*, (R. 3-6). The said order consolidated for hearing, together with the investigation proceeding, respondent's application, C. A. B. Docket No. 5774 (R. 5-6). By Board Order No. E-7174 dated February 19, 1953, petitioner was permitted to intervene (R. 186).

The enforcement attorney for the Civil Aeronautics Board produced no witnesses and no evidence of any kind during the entire course of the hearing. For all practical purposes he participated solely as an observer. The only evidence produced, in an attempt to prove a Section 411 violation by respondent, was that produced by petitioner through its employees (R. 416). After respondent had filed its application on October 6, 1952, to change the name appearing on its letter of registration, officials of petitioner supervising the New York City, Chicago and Los Angeles areas were told by their superiors to have subordinates prepare affidavits, reports or notes, which would show confusion based on name similarity between petitioner and respondent *only* (R. 20, 25-26, 29-30, 75-77, 100-102). It was the duty of these area supervisors under these instructions to secure evidence with which to prove the alleged confusion. (R. 37, 77, 101-102). The Board's finding of public confusion rests solely upon testimony of employee witnesses from the New York and Los Angeles areas concerning instances of alleged confusion.⁴ Rela-

⁴ Of the 13 employee-witnesses produced by petitioner (R. 7-8, 20, 40-41, 48, 69, 75-76, 79, 85, 91, 93, 96, 97-98, 100-101) 7 performed duties which required them to have regular contact with the traveling public (R. 4-41, 48, 69, 79, 85, 91, 93). Of these 2

tive to the evidence, the lower court stated:

"The Board rejected, and decided it 'need not comment' upon, its Examiner's finding:

'There is no evidence of record that North American adopted its name with intent to deceive the public or trade upon the good will and business reputation of American, or that American has been injured by such operation'

"Our examination of the record demonstrates that the Examiner was correct. Nor is there evidence that North American palmed itself off as American; that North American 'confused' American's passengers to the former's advantage; that North American's advertising was intended to or did entice American's passengers to fly North American, indeed it is difficult to assume that North American's advertising could be of the slightest advantage unless it could bring passengers to North American, rather than American. Nor is there evidence that North American flew a single passenger who paid its lower rate in the thought that he contracted for anything but North American's non-scheduled transportation, or that American was harmed otherwise than by the competition afforded by any irregular carrier. In

were ticket agents (R. 40-41, 48), and 5 were telephone reservation agents (R. 69, 79, 85, 91, 93).

* R 201. An exception to personal observation of such alleged instances of the confusion was the testimony of employee Witness Berg (R. 201) concerning the painting of a sign by non-union painters (R. 23-24). Witness Berg had no actual knowledge of the facts concerning the sign in question (R. 23-24). His only connection with the affair was the preliminary phone call made presumably by a union representative who voiced his objection to Mr. Berg (R. 23-24). Witness Berg had a Mr. Nicholls handle the problem (R. 24). Mr. Nicholls did not testify during the hearing. It was never established during the hearing what the sign said or whether the sign was petitioner's, respondent's, or someone else's. Witness Berg testified that the union representative told Mr. Nicholls that the sign was that of respondent (R. 24); however, according to the affidavit submitted by Mr. Nicholls, Mr. Nicholls told the union representative that the sign was respondent's (R. 154-155).

short, the public may have benefited, so far as the record shows, and in any event, there is no demonstration that North American affirmatively acted in violation of a statute within the jurisdiction of the Board." (Emphasis supplied) (R. 417-418).

The Civil Aeronautics Board found that the use by respondent of its corporate name, derivative of that name, "or any combination of the word 'American'" violated Section 411 of the Civil Aeronautics Act, *supra*, and ordered respondent and its agents to cease and desist from engaging in air transportation under its corporate name, derivatives thereof, "or any combination of the word 'American'" (R. 210-211, 229-230).

In an unanimous opinion, the lower court reversed the Board (R. 433). The lower court, quoting the Board's examiner stated:

"Section 411 was not designed for the purpose of protecting the private rights of an individual carrier except to the extent of regulating competition between the various air carriers to assure fair competition and thereby maintain a sound economic transportation system; also, equally important the Board was given the responsibility of safeguarding the public interest against unfair and deceptive methods of competition."

"The Examiner came almost to the heart of the problem; his error, like that of the Board, stems from the application of criteria which fell short of the public interest findings demanded by the law." (R. 418).

The Government did not petition for certiorari. On September 21, 1955, respondent below, American Airlines, Inc., filed a petition for certiorari which was granted on November 14, 1955.

SUMMARY OF ARGUMENT

1. The lower court correctly decided that the exercise of jurisdiction of the Civil Aeronautics Board under Section 411 of the Civil Aeronautics Act for the purpose of protecting "the public interest" was subject to judicial review.

It is clear from the legislative history of Section 411 that this section was closely patterned after Section 5 of the Federal Trade Commission Act and, as well established by this Court's decisions in *Federal Trade Commission v. Klesner*, 280 U.S. 19 (1929), *Federal Trade Commission v. Royal Milling Co. et al.*, 288 U.S. 212 (1933), and other precedents, the presence of a public interest is a jurisdictional requirement, the absence of which must lead to dismissal of the proceeding at any stage after its initiation. The rule of the *Klesner* case has not been devitalized and should not be abrogated, as petitioner here suggests, but under the circumstances of the present case should be strongly reaffirmed and re-applied. When last invoked in an enforcement proceeding under Section 5 (*Motion Picture Advertising Service Co., Inc. v. Federal Trade Commission*, 194 F.2d 633 (5th Cir. 1952)), the appellate court strongly relied on the *Klesner* rule and this Court, in reviewing the case, took no occasion to disturb that part of the appellate court's ruling. On the contrary, Mr. Justice Frankfurter, in a dissenting opinion which dealt with this particular problem, expressly quoted the *Klesner* doctrine with approval, as has the Federal Trade Commission itself in many recent proceedings (*In the Matter of Florida Citrus Mutual*, F. T. C. Docket No. 6074, 3 CCH Tr.Reg.Rep. 25076 (1954), and cases there cited).

2. The lower court's conclusion that the required "substantial and specific public interest" was lacking in the present case was entirely sound, and should be upheld by this Court under the rule of the **KLESNER** case and other recent precedents.

The hearing examiner in the present case made a specific finding to the effect that there was no evidence of fraud or intent to deceive the public (R. 197). This case involves no more than an attempt on the part of the intervenor, American Airlines, to seek a restraining order against a competitor on the ground that the latter's trade name may interfere with its alleged exclusive rights in the name American Airlines. This is a matter not peculiarly within the expert knowledge of the Civil Aeronautics Board, as petitioner claims, but a private dispute which should be tried before and decided by an equity court.

3. The petitioner's contention that the lower court erred in relying on a "long dog-eared dictum" of this Court (Pet. Br. 20) in **FEDERAL TRADE COMMISSION v. GRATZ**, 253 U.S. 421 (1920), for the purpose of showing that there could be no unfair method of competition in the absence of fraud, and on the decision of this Court in **FEDERAL TRADE COMMISSION v. RALADAM CO.**, 283 U.S. 643 (1931), for the purpose of showing that there has to be "competition" before an unfair method of competition may be found, is clearly refuted by the lower court's specific and careful statement that reference to these two precedents was made only for the purpose of emphasizing the requirement of public interest and for no other purpose; indeed, the lower court expressly refers to the very amendment to the Federal Trade Commission Act in 1938 which, according to the petitioner the court overlooked (R. 424).

Nor is there any basis for petitioner's theory that, even if the analogy of Section 5 of the Federal Trade Commis-

sion Act would generally apply, more was intended to be left to the "expert judgment" of the Civil Aeronautics Board in the air transportation field than had been entrusted to the Federal Trade Commission in cases within its jurisdiction. Respondent will argue that problems of trade name protection, trademark infringement and the like are completely outside the special field of "expert knowledge" of the Board.

4. Even if this Court should disagree with the lower court and with respondent's contention that the Board exceeded its jurisdiction in issuing the order here under discussion, it should be set aside on the additional ground that the Board failed to give any consideration whatsoever to the question whether a remedy other than "complete excision" of respondent's trade name might adequately protect the public.

It is now well settled since this Court's decisions in the *Royal Milling Company* case, *supra*, p. 8, and in *Jacob H. Siegel Co. v. Federal Trade Commission*, 327 U.S. 608 (1946), that cease and desist orders, while subject to limited judicial review in point of remedy, will be set aside or modified whenever the court is satisfied that the administrative agency has abused its discretion. Contrary to this Court's decision in the *Siegel* case, the Board, over the strong dissent of one of its Members, gave no consideration at all to the possibility of issuing an order which might have safeguarded the public against any possibility of confusion without at the same time depriving respondent of its well established trade name which, as the hearing examiner himself noted, had been selected in good faith and without any intention to deceive the public (R. 197).

ARGUMENT

I

THE DETERMINATION OF THE CIVIL AERONAUTICS BOARD THAT THE INSTITUTING OF A PROCEEDING AND THE ISSUANCE OF AN ORDER UNDER SECTION 411 OF THE CIVIL AERONAUTICS ACT WAS "IN THE INTEREST OF THE PUBLIC" IS SUBJECT TO JUDICIAL REVIEW.

1. A Preliminary Observation: The Economic and Political Background of the Controversy.

While the immediate issue now before the Court is limited to the specific question whether the order issued by the Civil Aeronautics Board, enjoining respondent absolutely from using its established corporate name or any other name including the word "American," involved a "specific and substantial public interest"—a question which the lower court unanimously answered in the negative—, respondent desires to suggest to the Court at the very outset that this case represents but one phase in the long standing controversy⁵ with respect to right of

⁵ Any application by non-grandfather applicants since the Board was created in 1938 to engage in transportation of passengers in competition with grandfather carriers has been denied. S. Rep. 540, 82d Cong., 1st Sess., "Report on Role of Irregular Airlines in United States Air Transportation Industry" (July 10, 1951); S. Rep. 822, 83d Cong., 1st Sess.; S. Rep. 1068, 82d Cong., 2d Sess. See also, *Additional Service to Atlanta and Birmingham*, 2 C.A.B. 447, 479 (1941); *Middle Atlantic Area Case*, 9 C.A.B. 131, 183 (1948); *Trans-Continental Coach Case*, 14 C.A.B. 720 (1951); *Additional Service to Puerto Rico Case*, 10 C.A.B. 430 (1951); *Southern Service to the West Case*, 12 C.A.B. 518, 534-535 (1951); *American Airlines v. Civil Aeronautics Board*, 192 F.2d 417 (D.C. Cir. 1951); *American Airlines v. Civil Aeronautics Board*, 178 F. 2d 903 (7th Cir. 1949).

In Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, Mr. Stanley Gewirtz, representing the

entry of new air carrier operators into the major air transport markets in competition with the so-called "grandfather" carriers who received their operating authority upon adoption of the Civil Aeronautics Act in 1938. Any suggestion that a finding by the Civil Aeronautics Board of "a public interest" may not be subject to judicial review would, of course, have to presuppose that the Board in its regulation of the air transport industry, particularly with respect to competition and right of entry of new operators, is guided solely by considerations of the public welfare as a whole, rather than by a policy of fostering the private interests of those relatively few certificated airlines for whose protection the so-called "grandfather" clause of the Civil Aeronautics Act of 1938 was enacted.

Respondent would be naturally reluctant, under ordinary circumstances, to cast any suspicion or doubt upon a Government agency's efforts to act as a true servant of the general public; but the attitude of the Civil Aeronautics Board which has effected total exclusion from participation in this industry of every applicant who would compete for passengers with the grandfather carriers, a policy which has long been an issue of public debate and Congressional attention, cannot be entirely

Air Transport Association, a trade association for grandfather carriers and most of the other certificated air carriers, testified as follows:

"Mr. Rodino: Has the ATA at any time favored the entry of new carriers into the business, either in Board proceedings or in testimony before Congress on legislation liberalizing entry standards?"

"Mr. Gerwitz: I would say no, we have not, and I do not propose to do it today." Current Antitrust Problems, Hearings before Antitrust Subcommittee of House Committee on the Judiciary, H. Rep., 84th Congress, p. 2558 (1955).

See also cases pending before the U.S. Court of Appeals for the District of Columbia Circuit reviewing recent certificate proceedings of the Board pursuant to a petition for review filed by respondent, U. S. App. D. C., G.A. Nos. 12947; 13053; 13132.

ignored as background material of paramount significance in reviewing Board decisions which seek to restrict or, indeed, eventually eliminate all competition on the part of the non-grandfather operators. Thus, the Senate Select Committee on Small Business, in 1951, recommended to the Board that it should "reassess its whole approach" toward air transportation with regard to non-scheduled operators.⁶ The report said:

"In 1946, with the development of the nonscheduled air carriers, a new type of operation was introduced, which had a shattering effect on the concept that air travel must necessarily be an elite type of luxury. The CAB during this recent period has been reluctant to recognize and protect the new enterprises, preferring to cling to the traditional position that American aviation transportation must perforce remain the exclusive franchise of the certified carriers." (p. 16).

The following year, the Committee's Annual Report was even more outspoken and critical. It said:

"Since World War II, a new type of air transportation, not necessarily competing with the large subsidized airlines, has been developed by a number of enterprising, small irregular or 'nonscheduled' air-transport companies. Over the past 3 years these companies have encountered 'competition by regulation' in a singularly frank demonstration of this technique. The regulatory body, in this instance the Civil Aeronautics Board, by the mere exercise of an administrative whim, has almost brought about the complete elimination of these small airlines."

Again, in an Annual Report of March 1953, the same criticism was repeated still more strongly:

⁶ S. Rep. 540, 82d Cong., 1st Sess., "Report on Role of Irregular Airlines in United States Air Transportation Industry" (July 10, 1951).

⁷ S. Rep. 1068, 82d Cong., 2d Sess.

"The CAB action against the irregular airlines, who were the originators of low-cost aircoach, took a number of forms, ranging from mild harrassment to outright elimination of some of the carriers The future growth, and even the continued existence of the independent airlines is in jeopardy. CAB's method of inducing 'death by delay' and 'strangulation by regulation' are just as fatal in the long run as outright elimination—which action the CAB apparently hesitates to take."*

In its report on the "Future of Irregular Airlines," July 31, 1953,⁹ the Select Committee on Small Business recommended that the door should be kept open to the operation of these airlines, and that the Board should not, through enforcement proceedings, "put out of business the economically significant elements of this industry within a short time" (p. 17).

This basic issue again received Congressional attention during the current hearings before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, U.S. Senate, on August 24, 1955. In testifying before the Committee, Professor Walter Adams, an Economics professor at Michigan State University and a Member of the Attorney General's National Committee to Study the Antitrust Laws, strongly criticized the Board's attitude toward nonscheduled airlines, and particularly respondent, in the following words:

"Similarly, I believe that the CAB's power to crush competition and to protect the entrenched position of the 'grandfather' carriers should be severely circumscribed. As you know, the CAB has recently pronounced a death sentence on North American Airlines, the largest nonscheduled passenger line in the country—the company which has innovated air coach and whose only crime, according to one of its officials, was

* S. Rep. 822, 83d Cong., 1st Sess.

⁹ "A Study of the Antitrust Laws," Part 3, Distribution Practices, August 23 to Sept. 2, 1955.

flying too many people too regularly too safely at too low a price.

"If this committee wants an agenda for action—if it wants to strike an effective blow for competition—here, it seems to me, is a good starting place.

"Not only should the death sentence against North American be revoked, but the company should be allowed to enter the airline industry on a permanent basis, so that it could bring its dynamic and progressive brand of competition to this expanding field." (*Hearings*, p. 1009).¹⁰

It is common knowledge by now that without the pioneering efforts of the non-certificated carriers, particularly this respondent, there would at best have been long delay in the development of the aircoach service which the certified air carriers were eventually forced to supply after having persisted until quite recently in the attitude that such aircoach service would have allegedly disastrous consequences for the industry.¹¹

¹⁰ The same authority elaborates on this exact point in his recent book, "Monopoly in America" (Adams, Gray, 1955), giving detailed quotations from the expressions of hostility of the certified airlines and of the Board toward the low price competition offered by the nonscheduled airlines.

¹¹ As late as May 1949, Mr. C. R. Smith, President of American Airlines, testified before the Johnson Committee as follows:

"We do not believe that we can presently engage in the coach service and provide the standard of service reasonably required without consequent loss and without, perhaps, getting our organization back into the subsidy situation." Airline Industry Investigation, Hearings before the Committee on Interstate & Foreign Commerce, U.S. Senate, 81st Congress, pp. 756-757 (1949).

Mr. Patterson, President of United Airlines, was even more reluctant to engage in the business. He stated:

"... if we had a little margin to work on we could experiment with coach, we could experiment with many things, but we just cannot afford to take the chance where we may affect, or create, greater losses than are staring us in the face right now." (Emphasis added).

We submit that, in considering the narrower "public interest" aspect involved in this controversy, the Members of this Court may not want to close their eyes to the fact that we may have here one of those situations in which an independent regulatory agency has, in considering the general public interest, so merged the private interest of the major members of the regulated industry with the overall public interest for whose protection the agency was created as to lose sight of the latter for the benefit of the former. Only about a month ago, a study entitled "Regulating Business by Independent Commission,"¹² was published at Princeton by one of that University's outstanding economists, who prepared this study upon the suggestion of the Assistant Director of the U.S. Bureau of the Budget. The chapter entitled "Search for the Public Interest" (page 154) opens with the following significant paragraph:

"Discussions of the 'public interest' that commissions are supposed to seek frequently seem unreal. Usually the public interest is conceived as a balancing by a commission of the interests involved in regulation. In its search for an equilibrium among the interested parties, it is assumed that a commission will be guided by its legislative mandate. *Unreality begins to creep in, however, as soon as it appears that the commission's enabling statute may in fact provide only the most general guide to the goals of regulatory policy. Left largely to its own resources, which are apt to be weak relative to the strengths of the organized parties, a commission will probably be guided by dominant interests in the regulated industry in its formulation of the public interest. Thus the public interest may become more private than public.*" (Emphasis added).

This, we submit, is exactly what has happened in the segment of administrative regulation presently under discussion. The action of the Civil Aeronautics Board, enjoin-

¹² Bernstein, Marver H. (1955).

ing respondent from continued use of its lawfully adopted name, is not only unprecedented, as the lower court correctly pointed out, but was instigated and conducted solely in the interest of the "intervenor," American Airlines, for the purpose of protecting its private interests and with the objective of furthering its efforts to eliminate from the air transport industry the remaining active opposition to Board policies which coincide with those advanced in the interests of the grandfather carriers.

The Court will also note in this respect that apparently the Government did not consider this matter to involve a sufficiently substantial public interest to justify the filing of a petition for certiorari on its part; as a result, while this controversy was originally entitled *North American Airlines, Inc. v. Civil Aeronautics Board, American Airlines, Inc., Intervenor*, it has in this Court been designated *American Airlines, Inc., Petitioner, v. North American Airlines, Inc., Respondent*, which in itself is a strong affirmation of the view here expressed that the Board, from the very beginning, acted in this case not on behalf of the public but overwhelmingly in the private interest of the largest member of the industry.

2. The Issue of "Public Interest" Under Section 411 of the Civil Aeronautics Act Is Subject to Judicial Review.

When the "public interest" requirement is viewed in the light of the Congressional and economic background to which we have invited the Court's attention in our introductory observations, it becomes immediately apparent that an issue of such paramount importance to the business community in general and to the American public could never have been intended to be withdrawn entirely from judicial review. On the contrary, it has never been seriously questioned, since this Court's decision in *Federal Trade Commission v. Klesner*, 280 U.S. 19 (1929),

that the existence of a substantial public interest is a jurisdictional prerequisite in those cases in which the statute specifically imposes a duty upon an administrative body to proceed only when the public interest is involved. In the *Klesner* case, this Court said:

"The order here sought to be enforced was entered upon a complaint which had in terms been authorized by a resolution of the Commission. The resolution declared, in an appropriate form, both that the Commission had reason to believe that Klesner was violating Section 5, and that it appeared to the Commission that a proceeding by it in respect thereof would be to the interest of the public. Thus, the resolution was sufficient to confer upon the Commission jurisdiction of the complaint. Section 5 makes the Commission's finding of facts conclusive, if supported by evidence. Its preliminary determination that institution of a proceeding will be in the public interest, while not strictly within the scope of that provision, will ordinarily be accepted by the courts. But the Commission's action in authorizing the filing of a complaint, like its action in making an order thereon, is subject to judicial review. The specific facts established may show, as a matter of law, that the proceeding which it authorized is not in the public interest, within the meaning of the Act. *If this appears at any time during the course of the proceeding before it, the Commission should dismiss the complaint. If, instead, the Commission enters an order, and later brings suit to enforce it, the court should, without enquiry into the merits, dismiss the suit.*" (Emphasis added) (280 U.S. 19, 29 and 30).

The Court thus made it clear that, even though the Commission's original administrative determination to institute a proceeding or, at least, an investigation into a matter which appears to involve a public interest would not ordinarily be reviewed, the subsequent issuance of a complaint and, even more, the issuance of a cease and desist order are always subject to the challenge that the original assumption of the presence of a public interest

is not borne out by the facts before the agency at the time when a decision has to be made of a quasi judicial nature concerning the issuance of a complaint, or an order to cease and desist. The petitioner's brief asks this Court not to apply this thoroughly well established rule in the present case on two grounds (not including petitioner's additional argument that the lower court erred in characterizing the present controversy as one involving primarily private rights, which should be adjudicated in a court of equity; this portion of petitioner's brief is considered separately below in Part II).

A. The Rule of the Klesner Case Has Not Lost Its Vitality, but Is Established Law Today.

In the first place, petitioner asks this Court to "reconsider" this part of the *Klesner* decision on the ground that review of the public interest issue "would inject the courts into an area of inquiry peculiarly administrative in character and inappropriate for judicial examination" (Pet.Br. 36). Moreover, it is suggested that the *Klesner* case has lost its vitality (Pet. Br. 32) and that "in the quarter century since the decision in the *Klesner* case it has been of little, if any, significance save to evoke an occasional form of words in judicial opinions (Pet. Br. 36).

We submit that the exact opposite is true, and that subsequent decisions by this Court, as well as by the lower courts and many rulings on the part of the Federal Trade Commission itself conclusively show that the reviewability of the public interest has remained an important characteristic of the modern law of administrative procedure and that our preliminary comments will have sufficed to demonstrate that the *Klesner* rule should remain as one of the bulwarks and safeguards against abuses of administrative discretion. Several years after the *Klesner* case, this Court stated in *Federal Trade Commission v. Royal Milling Co.*, 288 U.S. 212, 216(1933):

"To sustain the orders of the Commission, three requisites must exist: (1) that the methods used are unfair; (2) that they are methods of competition in interstate commerce; and (3) that a proceeding by the Commission to prevent the use of the methods appears to be in the interest of the public."

Similar language is found in this Court's decision in *Federal Trade Commission v. Raladan Co.* 283 U.S. 643 (1931). Even in *Moretrench Corp. v. Federal Trade Commission*, 127 F.2d 792 (2d Cir. 1942), on a dictum of which petitioner places particular reliance (Pet.Br. 36), Judge Learned Hand emphasized that the *Klesner* case "did indeed decide that the public interest in the controversy was a justiciable issue" (127 F.2d 792, 795).

The decisions of various courts of appeals in other circuits are to the same effect. See *Branch v. Federal Trade Commission*, 141 F.2d 31 (7th Cir. 1944); *Flynn & Emrich Co. v. Federal Trade Commission*, 52 F.2d 836 (4th Cir. 1931). Most recently, this allegedly devitalized doctrine was squarely applied by the Court of Appeals for the Fifth Circuit in *Motion Picture Advertising Service Co., Inc. v. Federal Trade Commission*, 194 F.2d 633 (5th Cir. 1952).¹³ The court there decided the case on the merits and found no actionable violation of Section 5 of the Federal Trade Commission Act on the part of the respondent, but observed that in its opinion, the case should have been dismissed by the Commission itself for lack of a public interest. The court said in this respect:

"If it appears at any time in the course of a proceeding such as this that it is not in the public interest, the Commission should dismiss the complaint. If the Commission fails to do it, the court should, without inquiry into the merits, dismiss the suit." *Federal Trade Commission v. Klesner*, 280 U.S. 19,

¹³ The lower court's decision was reversed by this Court on other grounds. *Federal Trade Commission v. Motion Picture Advertising Service Co., Inc.*, 344 U.S. 392 (1953).

30, 50 S.Ct. 1, 4, 74 L.Ed. 138, 68 A.L.R. 838, 846. *We have not exercised this power but have decided the case on its merits, though it does not appear to be in the public interest to increase the number or amount of advertisements of this character. The Federal Trade Commission Act was not passed to protect private rights, and it did not enlarge or change the definition of unfair methods of competition as laid down by the courts prior to its enactment. Federal Trade Commission v. Klesner, supra.*" (Emphasis added) (194 F.2d 633, 637).

A majority of this Court held, in regard to the merits of the controversy, that a violation of Section 5 had been established, without passing on the lower court's observations with regard to the public interest requirement. There is no suggestion in Mr. Justice Douglas' majority opinion that the Court intended, in any way, to modify or "reconsider" the *Klesner* rule, or that it had any doubt whatsoever with regard to the reviewability of this issue by the Court. On the contrary, Mr. Justice Frankfurter in his dissenting opinion in which Mr. Justice Burton joined, suggested that the case should have been remanded to the Commission "for adequate explanation of the reasons why the public interest requires its intervention and this order." (344 U.S. 392, 404). The *Klesner* case is then specifically referred to as supporting this view. "Until Congress chooses" (to face the problems raised by withholding judicial review of determinations by the Commission), "we cannot shirk our duty by leaving determinations of law to the discretion of the Federal Trade Commission," observed Mr. Justice Frankfurter.

The Federal Trade Commission, itself, has demonstrated on numerous occasions its complete awareness of the significance of the question of public interest, even within its own administrative operations. Whenever the Commission as a whole is satisfied, be it at the time of the filing of a complaint or at any subse-

quent time in a proceeding, that the required public interest is lacking, the complaint will be dismissed on that ground without any decision on the merits.¹⁴ Indeed, it seems that the only controversial issue within the Commission today involves the right of the *hearing examiner* to dismiss a proceeding on motion without deciding the case on the merits, on the ground that he has become satisfied that the Commission erred in authorizing the filing of the complaint.

A three-to-one majority of the Commission, in an opinion written by Commissioner Mason in *In the Matter of Florida Citrus Mutual*,¹⁵ came to the conclusion that, prior to the issuance of the complaint and prior to trial, the administrative discretion of the Commission regarding the existence of public interest was not subject to review and that it was reviewable on this point only after trial. It was therefore held that an allegation of lack of public interest did not present an issue on which a Hearing Examiner had authority to rule. However, Chairman Howrey, although concurring in the result, reached the conclusion that the public interest issue was a part of the adjudicatory responsibilities of the Hearing Examiner and could properly be passed upon by him upon motion to dismiss. Former Chairman Howrey made the following lucid observations in this connection:

"It may be helpful, at the risk of repetition, to consider the question of public interest as coming to bear at two stages: (1) as justifying the issuance of a complaint, and (2) as justifying a cease and de-

¹⁴ See *In the Matters of Wildroot Co., Inc.*, 5928, 49 F.T.C.D. 1578 (1953); *Denver Chemical Mfg. Co.*, 3 CCH Tr.Reg.Rep. 25070 (1954); *Metal Lathe Mfrs. Assn.*, 3 CCH Tr.Reg.Rep. 25076 (1954), and numerous others.

¹⁵ Commissioner Mead did not participate in the proceeding. F.T.C. Docket No. 6074—Opinion of the Commission, May 14, 1954.

sist order. The Commission's decision to issue a complaint is, as we have indicated, a matter of administrative discretion. The Commission's decision to issue an order, on the other hand, is adjudicatory and reviewable in the courts. In considering the issue of 'public interest' after complaint, the hearing examiner is looking toward the second stage. It is his duty to make a decision that will stand up before the Commission and in court. The Commission's decision to issue a complaint merely means that it is at that time, in its administrative capacity, of the opinion that the public interest requires a proceeding. It cannot mean that the Commission is of the opinion, in its adjudicatory capacity, that it is to the interest of the public to issue an order, for that would be to prejudge the case and do violence to fundamental principles of administrative and constitutional law."

Not only is the *Klesner* case relied on in support of this view, but the former Chairman also refers to a Commission directive which specifically requires the Hearing Examiners to include a finding on the public interest issue in their decisions. In observing that motions to dismiss for lack of public interest at this early stage should be granted only in exceptional cases, Mr. Howrey concluded:

"In exceptional instances, like the *Klesner* case, for example, the hearing examiner should by all means consider and decide the matter on a preliminary motion. This is consistent with recent decisions of the Commission, with court cases, and with the best interests of the public—which include economies resulting from early focusing on the decisive issue and speedy disposition of cases."

Enough has been said, we submit, to demonstrate that the *Klesner* rule, far from having lost its vitality or being "of only minor importance", has remained a highly significant feature of our administrative law, and that the present controversy is eloquent proof of the need for its reaffirmance, rather than its reconsideration.

B. The Public Interest Requirement in Section 411 of the Civil Aeronautics Act Is Not Different either in Substance or Procedure from the Identical Requirement in Section 5 of the Federal Trade Commission Act.

The petitioner also suggests in its brief (pr. 32) that the *Klesner* rule, even if still the law with regard to Federal Trade Commission proceedings, should find no application to proceedings under Section 411 of the Civil Aeronautics Act because of the somewhat different wording of that section. It clearly appears, however, from comparison of Section 5 of the Federal Trade Commission Act and Section 411 of the Civil Aeronautics Act that the fact that the latter expresses in two sentences what the former includes in one was not intended to make any more difference in the result than the fact that in the former act, the language "if it should appear to the Commission" is used, while in the latter, the statute says:

"If it [the Board] considers . . .". In other words, the petitioner suggests (Pet. Br. 32) that once the Civil Aeronautics Board has decided to investigate a matter on the assumption that the public interest may be involved, it *must* issue a cease and desist order even if it should subsequently be found that the alleged public interest was wanting. Nothing in the legislative history of the Act would support such interpretation, particularly since the very wording of Section 5 of the Federal Trade Commission Act would seem to make it equally mandatory upon the Commission ("shall issue and serve . . ." Sec. 5 (b)) to file a complaint, without at that time reviewing the public interest issue. Actually, the only difference between the two acts is one of procedure, in that under the Federal Trade Commission Act a formal complaint is filed, while Section 411 of the Civil Aeronautics Act dispenses with the filing thereof. But both Agencies have undoubtedly a statutory obligation to review the public interest issue before any final order is issued. That this was the legislative intent behind Section 411 is, more-

over, clear from the history of this section as extensively discussed in Part II of the lower court's opinion (R. 419), and particularly from the quoted testimony of Commissioner Eastman, who stated that Section 411 was "substantially a duplicate of the provisions under the Federal Trade Commission Act . . ." (R. 422).

Petitioner cannot, therefore, derive any support for its view from the fact that the respective statutory provisions here under discussion show some minor and in fact only editorial differences in exact wording.¹⁶

¹⁶ This is true also with regard to another difference in language on which petitioner seeks to rely. It suggests (Pet. Cert. p. 5) that the Civil Aeronautics Act empowers the Board to issue its complaint either "upon its own initiative or upon complaint by any air carrier, etc." It is true that the language "or upon complaint by any air carrier, etc." has no verbatim counterpart in Section 5 of the Federal Trade Commission Act, but this, too, was not intended to bring about a change in administrative practice nor has it been so interpreted. On the contrary, the Federal Trade Commission in its own rules makes it abundantly clear that it will proceed either upon its own initiative or upon complaint of any party whose interests may have been adversely affected. Attention is called in this regard to *Rules of Practice, Procedure, Organization and Acts, Federal Trade Commission* (May 1955), Secs. 1.12 and 1.13, p. 7; moreover, Section 5 of the Federal Trade Commission Act itself expressly provides: (b) "any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person." Such interventions have frequently been sought and permitted in recent years, including, for instance, intervention by the State of Florida in the above mentioned *Florida Citrus* litigation, *supra*, p. 22. It is true that the Federal Trade Commission rules also note, in paragraph 1.14, that an applicant should never be regarded as a "party" because "the Commission acts only in the public interest". This should be true too in analogous proceedings under Section 411, and we submit that the section was never intended to empower the Board to make its facilities and sanctions available to an intervenor who actually seeks a restraining order against use of an allegedly infringing trade name or trademark under a pretext of "public interest."

II

THE COURT BELOW WAS CORRECT IN SETTING ASIDE THE BOARD'S ORDER FOR LACK OF A "SPECIFIC AND SUBSTANTIAL PUBLIC INTEREST".

We now come to the substantive rule of the *Klesner* case and its applicability to the present controversy.

- 1. It Is Still the Law Today That the Presence of a Specific and Substantial Public Interest Is an Indispensable Jurisdictional Requirement.**

The lower court placed reliance upon this Court's decision in *Federal Trade Commission v. Klesner*, not only for its conclusion that the presence of a substantial public interest was subject to judicial review, but also for the teaching of that famous case, as well as this Court's subsequent decision in *Federal Trade Commission v. Royal Milling Co.*, 288 U.S. 212 (1933), that the Federal Trade Commission, under Section 5 of the Federal Trade Commission Act—or, in this case, the Civil Aeronautics Board under the almost identically worded Section 411 of the Civil Aeronautics Act—is not the proper forum to adjudicate controversies of a primarily private nature, including particularly cases involving alleged trademark or trade-name infringement. Mr. Justice Brandeis in the *Klesner* case, which, as does this case, involved a controversy over a trade name, laid down the applicable test in the following classic language which has been repeatedly referred to in subsequent decisions of this Court, and was neither reversed, modified, or changed by the enactment in 1938 of the Wheeler-Lea Act:

"A complaint may be filed only 'if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public.' This

requirement is not satisfied by proof that there has been misapprehension and confusion on the part of purchasers, or even that they have been deceived,—the evidence commonly adduced by the plaintiff in 'passing off' cases in order to establish the alleged private wrong. It is true that in suits by private traders to enjoin unfair competition by 'passing off,' proof that the public is deceived is an essential element of the cause of action. This proof is necessary only because otherwise the plaintiff has not suffered an injury. There, protection of the public is an incident of the enforcement of a private right. But to justify the Commission in filing a complaint under section 5, the purpose must be protection of the public. The protection thereby afforded to private persons is the incident. Public interest may exist although the practice deemed unfair does not violate any private right." (280 U.S. 19, 27).

And again:

"In determining whether a proposed proceeding will be in the public interest the Commission exercises a broad discretion. But the mere fact that it is to the interest of the community that private rights shall be respected is not enough to support a finding of public interest." (280 U.S. 19, 28).

In the *Royal Milling Company* case, *supra*, p. 26, decided four years later, this Court reaffirmed the *Klesner* doctrine, even though it was there held that actual fraud and misrepresentation, a species of deception was present, the suppression of which involved "a specific and substantial public interest." But, at the same time, the Court observed:

"It is true, as this court held in *Federal Trade Comm'n v. Klesner*, 280 U.S. 19, that mere misrepresentation and confusion on the part of purchasers or even that they have been deceived is not enough. The public interest must be specific and substantial." (288 U.S. 212, 216).

In *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 533 (1935), the Court, in examining the

Commission's jurisdiction under Section 5, once more referred to the requirement of a specific and substantial public interest, expressly citing the *Klesner* decision in this respect.

The petitioner's brief refers to the fundamental doctrine of the *Klesner* case as having little, if any, "vitality" today (Pet. Br. 32). Indeed, it is suggested "that in the quarter century since the decision in the *Klesner* case it has been of little, if any, significance save to evoke an occasional form of words in judicial opinions." (Pet. Br. 36). Consequently, this Court is invited by petitioner to "reconsider" the *Klesner* doctrine (Pet. Br. 37).

We shall now proceed to show that neither the cases nor the other authorities referred to in petitioner's brief bear out this proposition but, on the contrary, strongly suggest that the present controversy may present a welcome opportunity to this Court to limit the jurisdiction of independent Government agencies to those matters which are deemed to be within their separate and special expert knowledge and which involve a paramount public interest.

Let us begin by consulting some of the evidence available from sources going back to the very formation of the Commission. We find in this regard that one of the House conference managers and chairman of the subcommittee in charge of the Federal Trade Commission bill, made the following statement in 1914:

"[the public interest clause of section 5] prevents the commission from becoming a clearing house to settle the everyday quarrels of competitors, free from detriment to the public, which should be adjusted through the ordinary processes of the courts." 51 Cong. Rec. 14930 (1914).

Nelson B. Gaskill, who served as a Federal Trade Commission Chairman and Member, and who also wrote

The Regulation of Competition (New York, 1936),¹⁷ had this to say with regard to the public interest requirement in *Proceedings, Academy of Political Science*, Vol. 11, No. 4 (January 1926), at pp. 122-123:

"The Commission view has been that this procedural direction was in the nature of a saving clause which afforded an administrative discretion of non-action when it might not agree with a complainant that the law had been violated, or of refraining from the issue of a complaint otherwise justified, when it might not seem to serve the public interest by doing so. *The judiciary at first seemed to concur in this interpretation, but a trend of difference began to appear until it is now settled law that public interest in the suppression of a chosen method of unfair competition is a justiciable issue which must be charged and proven.*" (Emphasis added).

Particularly revealing are the observations of Gerard C. Henderson in his book, *The Federal Trade Commission* (Yale University Press, 1924), which is rightly referred to by petitioner as a "landmark work" on the subject of the Commission. While the author quotes the Federal Trade Commission itself as having taken the view in one of its early annual reports (1920) that the issue of public interest was not subject to judicial review (this was, of course, several years before this Court's decision in the *Klesner* case), Mr. Henderson goes all out in suggesting that trademark and trade name controversies of the type here involved should remain outside the Commission's general jurisdiction in the absence of certain exceptional circumstances (fraud, restraint of trade, etc.) which are not present here (Henderson, *The Federal Trade Commission*, p. 169 *et seq.*). Henderson refers to "a series of 'conference rulings'" in which the Commission went on record that the public interest would not ordinarily warrant the issuance of a com-

¹⁷ The *Klesner* case is dealt with at length, beginning at p. 80.

plaint where issues of infringement of patents, copyrights, or registered trademarks were involved.¹⁸ The author says:

"Where there is a real dispute as to the substantive rights of the parties, where, for instance, each party claims in good faith the right to use a trade name or design, the tribunal must be in a position to render a decision which is just, impartial, and binding on the parties. Where, on the other hand, the rights of the complainant are clearly established, the problem is one of enforcement, and the tribunal must be equipped to compel prompt and complete obedience to its orders, and to secure effective redress for past injuries. The Federal Trade Commission cannot properly perform either of these tasks."¹⁹

The argument that there is a legitimate place for the Commission (or, here, the Civil Aeronautics Board) to appear in such cases "as the protector of the weak against the strong" is met with the observation that in actual practice; the companies for whose protection complaints have been issued by the Commission all involve large corporations whose officials "would hardly admit that they were applying, *in forma pauperis*, to have the Government assume the expense of their private litigations."²⁰ Henderson rightfully suggests that public funds should not be expended by a Governmental agency to relieve a corporation of the burden of proving a trade name infringement case for which a remedy would lie in a court of law or equity.²¹ If we be permitted to quote once more from this leading treatise, we will find that among the conclusions reached by the author, the following recommendation is made:

¹⁸ Conference rulings Nos. 74, 58, 46, and 68 (I F.T.C.D. 560, 554, 548 and 547, respectively).

¹⁹ *Id.*, pp 172, 173.

²⁰ *Id.*, p. 175.

²¹ *Id.*, p. 228.

"It seems to me that the Commission is handling too many cases, and that it should exercise a greater discretion in selecting those cases which involve questions of public importance. It does not seem necessary that public funds should be employed to prosecute cases involving controversies between private parties, where a full and adequate remedy can be obtained in a court of law or equity."²²

~~Id., p. 337.~~

Nor is there any basis for petitioner's contention that decisions by lower courts subsequent to this Court's decision in the *Klesner* case have served to devitalize the *Klesner* rule; on the contrary, a careful review of these decisions will reveal that in the vast majority of cases involving misuse of a trademark or trade name far more was involved than the "confusion" (Judge Danaher's quotation marks, opinion, R. 415) found attributable by the Board to respondent's use of its trade name. In *Flynn & Emrich Co. v. F.T.C.*, 52 F.2d 836 (4th Cir. 1931), the Court of Appeals set aside the Commission's order for lack of public interest in the following words:

"The case here is rather a controversy of a private and personal nature between the petitioner and the Perfection Company, and could have been readily settled in the courts, and if a proper case were made an injunction would have issued against the petitioner. Certainly Congress never intended that the machinery of the Federal Trade Commission, severe as its operation can be made, should be set in motion for the settlement of private controversies, when the courts can act. The official character of the Commission makes it all the more necessary that it act only when the public interest is involved. It was never intended that the Commission should act the part of a petty traffic officer in the great highways of commerce." (52 F.2d 836, 838).

In *S. Buchsbaum & Co. v. Federal Trade Commission*, 160 F.2d 421 (7th Cir. 1947), the Court of Appeals set

22/ Id., p. 337.

aside the Commission's order on the ground that the acts there involved had not been shown to be "all to the prejudice and injury of the public" (160 F.2d 121, at 124), but were complained of by a group of competitors who were unsuccessful in meeting the cheaper prices of the petitioner's products. In the few cases in which infringement of trademark or trade name was found to be actionable under Section 5 of the Federal Trade Commission Act, additional factors of gross deception of the public were invariably involved. Such, for instance, was the much quoted case of *Federal Trade Commission v. Balme*, 23 F.2d 615 (2d Cir. 1928), *cert. denied*, 277 U.S. 598 (1928), in which the respondent was enjoined from using certain designations which falsely indicated French origin of its product, and which involved in addition to charges of a trade name infringement numerous instances of deliberate passing off. The Commission's order was upheld and sufficient public interest found to exist on the ground of false and misleading advertising, which included, among other dishonest practices, a deliberately misleading use of a trade name.

Similarly, in *Pep Boys—Manny, Moe & Jack, Inc. v. Federal Trade Commission*, 122 F.2d 158 (3d Cir. 1941), twice referred to in petitioner's brief (at pages 22 and 25), use by defendant of the famous trademark "Remington" on radio tubes was enjoined on the ground that the defendant had deliberately adopted an extensively advertised name for the purpose of injuring the business of present or potential rivals and that the result of its practice was "that purchasers of 5800 radios from 1935 to 1939 may have been deceived into purchasing an article which they might not have bought if correctly informed as to its origin" (122 F.2d 158, at 161). The court was of the opinion that the public was entitled to be protected against this "species of deception". Although it may well be doubted whether the court was justified,

even in the light of the facts in the "Remington" case, in sustaining the Commission's order on the basis of a substantial public interest, the opinion itself quoted the following passage from the *Klesner* decision:

"To justify filing a complaint the public interest must be specific and substantial. Often it is so, because the unfair method employed threatens the existence of present or potential competition. Sometimes, because the unfair method is being employed under circumstances which involve flagrant oppression of the weak by the strong. Sometimes, because, although the aggregate of the loss entailed may be so serious and widespread as to make the matter one of public consequence, no private suit would be brought to stop the unfair conduct, since the loss to each of the individuals affected is too small to warrant it." (280 U.S. 19, at 28).

None of these elements referred to by Mr. Justice Brandeis in *Klesner* as possible bases for the finding of a public interest can, of course, be found in the present case. Certainly, the use of this respondent's trade name does not "threaten the existence of present or potential competition;" on the contrary, unremitting efforts of the large certified air carriers and the Board threaten to eliminate all competition by non-grandfather operators.²³ Nor do we have here the "flagrant oppression of the weak by the strong" as an unfair method employed by respondent, but rather the exactly reverse situation. Nor could the petitioner, American Airlines, Inc., be heard to argue that this matter was too insignificant for it and others affected to institute the appropriate civil litigation.

The element of strong and deliberate deception of the

²³ See note 5 *supra*.

public was present not only in the cases previously referred to but was also present in *Federal Trade Commission v. Real Products Corporation*, 90 F.2d 617 (2d Cir. 1937), involving flagrant misuse of the word "Champion", and in *Moretrench Corporation v. Federal Trade Commission*, 127 F.2d 792 (2d Cir. 1942), so strongly relied upon by petitioner (Pet. Br. p. 25).²⁴ It was there found that certain advertising claims made by respondent were palpably misleading and that therefore a substantial public interest within the *Klesner* rule was present. It is true that at that time (1942), Judge Learned Hand did express some doubt with regard to the actual scope of the *Klesner* rule but subsequent decisions by the same court—and particularly, the most recent ones—show that the doctrine is very much alive in the Second Circuit in all its aspects. In the most recent case of *New American Library v. Federal Trade Commission*, 213 F.2d 143 (2d Cir. 1954), the majority opinion not only held the public interest issue to be subject to judicial review and the Commission's order subject to review even in point of remedy, but also held that the situation was not one "in which the need to prevent deception has been shown to require the regimentation of an industry, thereby depriving it of the benefit of legitimate enterprise in competition and denying to its product the quality of individualized treatment." It was then concluded by the majority that the public interest could be sufficiently protected by other means than those requested in the Commission's order.

Petitioner also seeks to derive some comfort from Professor Milton Handler (an eminent authority on this

²⁴ In the cases, *Federal Trade Commission v. Algoma Co.*, 291 U.S. 67; *Federal Trade Commission v. Balme*, 23 F. 2d 615 (2d Cir. 1928), cert. denied, 277 U.S. (1928); *Gulter v. Federal Trade Commission*, 186 F. 2d 810 (7th Cir. 1951), cert. denied, 342 U.S. 818, and cases cited by petitioner, likewise involve strong fraudulent statements which is not true in the instant case.

subject), who is quoted as regarding the *Klesner* rule as "of minor if any importance" (Pet. Br. 33). This, we submit, is a misquotation of both Professor Handler's actual statement and of his views on the point involved. Professor Handler actually states, in his article, *Unfair Competition and the Federal Trade Commission*, 8 Geo. Wash. L. Rev. 399 (1940), at p. 404:

"The *Klesner* case still retains its vitality, but its principal effect has been to exclude from the Commission's jurisdiction minor peccadillos and invasions of private rights."

However, he subsequently expresses his own views, just as did Mr. Henderson, *supra* p. 30, to the effect that the Commission should not act in cases in which a private remedy is clearly available and adequate. Said Professor Handler:

"Here again, the private remedy being adequate, it is questionable whether public funds should be expended for the protection of private rights. There are, of course, cases where the brands and the manner of their use are so deceptive as to warrant action by a public body. The distinction is well illustrated by the *Masland* and *Klesner* cases. Respondents in the *Masland* case sold a product known as 'Duraleather,' an imitation leather. The Commission found that the brand not only infringed upon the registered mark 'Duro' used by a competitor on real leather but falsely implied that the product on which it was used consisted of genuine leather. The *Klesner* case involved the use of the trade name 'The Shade Shop,' in alleged violation of the rights of the first user of the name. The Commission was sustained in the first and reversed in the second case, the Supreme Court intimating that the repression of trade mark infringement and the simulation of another's brand were beyond the purview of the Commission's authority. There are, however, several rulings of the Circuit Courts of Appeal upholding the Commission's orders, and it is not improbable that its power to forbid this species of unfair

competition will be sustained notwithstanding the objections to which we have adverted." (*Id.* pp. 412, 413).

The cases referred to by Professor Handler in support of this last point are the very cases previously mentioned here, *Federal Trade Commission v. Real Products Corp.*, *supra*, p. 34, and *Federal Trade Commission v. Balme*, *supra*, p. 32, in which the court had found actual fraud to the same extent as in the "Duraleather" case (*Masland Duraleather Co. v. Federal Trade Commission*, 34 F. 2d 733 (3d Cir. 1929)).

In other words, Professor Handler, although relied upon by petitioner several times as an advocate of sounding the death knell to the *Klesner* case, is, in fact, one of the *Klesner* doctrine's staunchest supporters and has expressly taken the view that the use of an allegedly confusing trade name, without more, will not constitute the type of case which involves *the specific and substantial public interest*, without the presence of which neither the Federal Trade Commission nor the Civil Aeronautics Board may validly issue cease and desist orders under their respective organic acts.

2. The Lower Court Was Correct in Holding that the Present Case Involves No Substantial Public Interest.

We submit that it appears abundantly clear from the lower court's review of the entire record of this case, as it had the right and duty to do under this Court's decision in *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474 (1951), as well as from the dissenting opinion of Board Member Adams, that in essence the present case falls squarely within the substantive rule of the *Klesner* case and, if it were a Federal Trade Commission proceeding, within that Commission's Rule 1.24, under which the Commission will not take action "when the alleged violation of law is

merely a matter of private controversy and does not tend adversely to affect the public."

a) *Lack of Public Interest Appears from the Procedural History of this Case.*

In the first place, the lack of a public interest is apparent here even when looking only at the procedural history of the case. It was the intervenor who alone offered evidence of alleged confusion consisting solely of testimony of intervenor's employees. The examination for the most part was conducted by intervenor's attorney, with little participation by the Government. Moreover, as already noted in our preliminary observation (*supra*, p. 17 *et seq.*), it was the intervenor only who petitioned this Court for certiorari; apparently the Department of Justice did not deem the matter of sufficient public importance even at that point to join with the intervenor in a petition for certiorari. The Government's brief, submitted on behalf of the Board to this Court, is but a short summary and reiteration of the intervenor's main brief. It thus appears from the past history of the case that the administrative process of the Civil Aeronautics Board was permitted to be used not on behalf of a protection-deserving public but for the purpose of vindicating the intervenor's alleged exclusive rights in its trade name or service mark. In other words, the lower court was clearly correct in holding that if American Airlines, Inc., believed that its exclusive rights in its registered service mark, "American Airlines," were infringed upon by respondent's use of the name "North American," it should have instituted a conventional civil action for trademark infringement or unfair competition, which may or may not have resulted in private relief. We have not yet reached the point where a trademark owner, realizing perhaps the weakness of his position in an equity court, may seek more drastic relief by invoking the administrative processes of a Govern-

ment Agency which, while assumed to have expert knowledge and experience in all matters related to air transportation, lacks both the jurisdiction and the competence to pass upon a conflict between trademarks or trade names.

- b) *The Lower Court Correctly Found that the "Confusion" Was Unsubstantial and in Any Event Insufficient to Characterize the Use of Respondent's Name as "An Unfair or Deceptive Practice" Under Section 411.*

There is no need here to review the total absence of any element of deception, actual misrepresentation, or fraud, since both the dissenting Board Member and particularly the lower court, at page 7 (R.417) of its decision, have done so quite extensively and since even the Hearing Examiner, whose findings were sustained by a majority of the Board, expressly found as follows:

"There is no evidence of record that North American adopted its name with intent to deceive the public or trade upon the good-will and business reputation of American, or that American has been injured by such operation." (R. 197).

As stated by Judge Danaher in the lower court's unanimous opinion (R. 417, 418), there was no evidence whatever of actual passing off nor was it shown that any of American Airlines' passengers were actually confused to the advantage of North American, nor that any false representations on the part of North American were made in its advertising which may have enticed prospective American Airlines passengers away. The court went so far as to suggest that in fact the public may have benefited (R. 418) rather than have been deceived. Whatever actual "confusion" there was found to exist was correctly characterized by the dissenting Board Member

when he stated that he would have been greatly surprised, in view of the several million phone calls which American receives every year, "if there were not *some* demonstrable public confusion." (R. 212).

If such occasional and usually quite harmless confusion were all that would be required to enjoin absolutely the use of a trade name which was found to have been adopted and used without intention to defraud, then, we submit, a similar degree of confusion could easily be found among the equally or more confusing trade names or trademarks which are currently being used by most of the large certified airlines. Among the major airlines we find that one carrier does business under the name Northwest Airlines Inc., while another operates under Northeast Airlines, Inc., to say nothing of Eastern Airlines, Inc., and Western Airlines, Inc., or the similarity between American Airlines, Inc., and Pan American Airways, and the fact that in addition there are, as the lower court pointed out, several other carriers such as All American Airways, which had been using the word "American" for considerable periods of time.²⁵ Surely,

²⁵ The fact that Pan American has been using "American" in its trade name only in international air transportation is of no consequence. The distinction between domestic, international, and overseas air transportation, and which carriers provide an air service in these relatively arbitrary categories is at best obscure in the mind of the public. This obscurity has not been clarified by time. Pan American in a case presently before the Board is presently attempting to enter the domestic air transportation picture by acquiring a heavily travelled route between New York and Miami. *New York-Florida Case*, C.A.B. Docket No. 3051. At one time, petitioner, American Airlines, engaged in considerable international air transportation through American Overseas Airlines, Inc., the certificate of which was ultimately transferred to Pan American. *North Atlantic Transfer Case*, 11 C.A.B. 676 (1950). Even now, the Official Airline Guide map of petitioner's system (R.276), clearly depicts petitioner as an international carrier, serving such cities as Mexico City and Monterrey, Mexico, as well as Toronto, Canada. The Board's order, of course, is not limited to domestic

occasional confusion will arise between Northwest and Western, or Northeast and Northwest or American and Pan American, but none of these air carriers would be likely to go to the extent of suggesting to the Civil Aeronautics Board that it enjoin use of a competitor's name as an unfair trade practice under Section 411 of the Act. We believe that the lower court was entirely correct when it held, in accord with this Court's decisions in the *Klesner* case, the *Royal Milling* case, the *Raladam* case, and others referred to in the appendix to the court's decision (R. 433-435), that the past history and record of this case fall utterly short of evidencing a specific and substantial public interest or, for that matter, any demonstrable public interest whatsoever. It is not surprising then that the majority of the Board itself considered this case and the Board's order "unprecedented" which was also the characterization given to this case by the court below (R. 414). This case is indeed unprecedented and respondent hopes that upon this Court's affirmance of the lower court's decision, it will remain the first and only trade name controversy which will be submitted to the Civil Aeronautics Board for adjudication of a private dispute.

air transportation. Respondent is prohibited from using its name in *all* air transportation.

Petitioner was in active competition with All-American from 1941 to 1949 in so far as the air transportation of mail was concerned. From 1949 until 1952, All-American competed with petitioner in the air carriage of passengers (R. 276, 286-291, 299-300). The fact that All-American is a small air carrier cannot be held against it (Pet. Br. 29).

c) *Petitioner's Contention that the Issue of Trade Name Confusion Was Intended to Be Left for Determination by the Board Because of the Latter's Special Expertise in the Field of Aeronautics Is Without Merit.*

It remains briefly to comment upon one other criticism found in petitioner's brief with regard to the lower court's reliance on the *Klesner* rule. Petitioner has suggested (Pet. Br. 37) that even if the *Klesner* rule be applicable law today, it should not have been applied to a proceeding under Section 411 of the Civil Aeronautics Act on the ground that

"the Civil Aeronautics Board applies itself to the highly specialized questions of the air transport industry and is intended by Congress to have an expertness and to be relied upon in the application of the Act to a degree which could never be possible of an agency such as the Federal Trade Commission having only a sort of roving commission over the whole field of business." (Pet. Br. 37).

Reference is then made (Pet. Br. 38) to

"the complex, dynamic and esoteric air carrier industry with which the Civil Aeronautics Board is concerned every minute of every day."

Petitioner has suggested that the lower court

"undertook to cope with a question with which it is not equipped to cope and with which Congress never intended that it should be concerned." (*Ibid.*).

This is indeed a perversion of the purposes and function of the Board which refutes itself by a mere glance at the record in this case, and at the Examiner's and the Board's decisions. No one will deny that in matters concerning air traffic and aeronautics generally, the Board is supposed to be possessed of expert knowledge and judgment which may be entitled to great and often

controlling weight by a reviewing court; but it borders on absurdity to suggest that the right to the use of a certain trade name or trademark in connection with carrier services can, under any conceivable circumstances, fall within the Civil Aeronautics Board's domain of expert judgment, particularly where, as here, both the Examiner and the Board had to admit that a question of this nature had never been brought before them since the enactment of the Civil Aeronautics Act. There are hundreds of adjudicated cases, both federal and state, in which our courts have had to pass upon what the lower court here rightly characterized as the "complicated issues" of trademark and trade name infringement. Can it be seriously argued that the Civil Aeronautics Board is better equipped to adjudicate such matters than our equity courts, which have developed an entire branch of jurisprudence in this field? We are confident that this Court will not agree with the petitioner that the lower court's comprehensive and scholarly opinion justifies petitioner's charge that the court was not "equipped" to cope with the question of trade name infringement and that "the Congress never intended" that it should cope with that question: (Pet. Br. 38).

In summary, then, it is respondent's position that the question whether the use of the name "North American" is an infringement of American Airlines' rights is a matter primarily justiciable before our civil courts and not within the jurisdiction of the Civil Aeronautics Board. In other words, if it be true, as here argued, that the present case would not even be within the cognizance of the Federal Trade Commission for want of a substantial public interest, then it would seem to follow *a fortiori* that the alleged misleading use of a trade name should not be held to be encompassed within the

regulatory administrative functions of the Civil Aeronautics Board.²⁶

III

THE LOWER COURT DID NOT HOLD THAT SECTION 411 OF THE CIVIL AERONAUTICS ACT IS CONFINED TO PRACTICES INVOLVING FRAUDULENT INTENT, PALMING OFF BY DECEPTION, AND INJURY TO A COMPETITOR.

As has been previously pointed out, the lower court's opinion is actually based on the court's conviction that

"It may not be amiss to call the Court's attention to a paper recently read by Former Federal Trade Commission Member, Albert A. Carretta, entitled *The F.T.C., Trademarks and Public Interest*, 45 Trademark Reporter 865 (August 1955). Not only did the former Commissioner state that the Commission's action in authorizing the filing of a complaint upon being satisfied that the proceeding would be in the public interest, is subject to judicial review, but Mr. Carretta went on to say:

"The problem concerning 'public interest' cannot be minimized. At the time the Commissioners are called upon to determine whether a complaint should issue, it is not always a simple matter to decide with certainty whether public interest, within the meaning of the Act, exists. Certainly, the mere fact that it is to the interest of the community that private rights shall be respected is not enough to support a finding [sic] public interest." And again:

"The Government of the United States should certainly do everything within its power to protect both businessmen and consumers against the improper use of trade-marks. But the Government should not spend taxpayers' money in an attempt to settle private controversies. It should proceed with caution therefore in handling cases of doubtful public interest."

Attention is then called by Mr. Carretta to the decision of the lower court in this case, and the former Federal Trade Commissioner expresses complete approval of the lower court's decision on the public interest issue. He states:

"It thus appears quite clear that where 'public interest' is a statutory factor, the Circuit Court for the District of Columbia Circuit is not receptive to the idea that the vast forces of the Federal government should be used to protect a name monopoly unless adequate explanation can be made of the reasons why the 'public interest' requires such use."

the subject matter here involved was beyond the Board's jurisdiction and that this was not a case in which a public body "might be expected to provide a remedy in the public interest, where resort by an individual to the courts would largely be fruitless or impractical" (R. 431-432). It is respondent's position, as previously stated, that this ruling is eminently sound and in accord with all previous decisions of this Court. Petitioner, however, virtually erects a strawman by putting into the mouth of the lower court two alleged additional bases for its opinion which, in actual fact, were not so considered by the court itself. It is alleged in both petitioner's brief in this Court (p. 20), and in the Government's brief (p. 14 *et. seq.*), that the lower court erred in putting its "principal reliance" on the well known dictum by Mr. Justice McReynolds in *Federal Trade Commission v. Gratz*, 253 U.S. 421 (1920), "that the phrase 'unfair method of competition' in Section 5 of the Trade Commission Act was 'clearly inapplicable to practices never heretofore regarded as . . . deception, bad faith, fraud or oppression . . .'. We agree with the petitioner that the quoted statement is not the law today and that since this Court's decision in *Federal Trade Commission v. Keppel & Bro.*, 291 U.S. 304 (1934), numerous forms of unfair competition have been held to come within the jurisdiction of the Federal Trade Commission under Section 5, despite the fact that they may not have been considered actionable under the private common law of unfair competition. But the lower court was not only completely aware of this but at the end of its opinion actually pointed out the types of unfair practices which might be properly considered unfair acts or practices under Section 411 of the Civil Aeronautics Act or Section 5 of the Federal Trade Commission Act even though no private remedy would lie in those instances. Indeed, the lower court quoted Mr. Justice Brandeis' dissenting opinion in the *Gratz* case; *supra*, in this con-

nection before reaching the conclusion that mere protection of a trade name monopoly was "far outside the scope of the powers entrusted to the Board" (R. 432).

The quotation from the *Gratz* case at page 13 of the lower court's decision (R. 423), of which so much is made by petitioner, is immediately qualified by a quotation from *Schechter Corp. v. United States*, 295 U.S. 495, 533 (1935), which went even further than the *Keppel* case in ruling that the term "unfair methods of competition" is not measured by common law standards. Even a casual reading of this part of the lower court's opinion will reveal that the references to the *Gratz* and *Schechter* cases were merely included further to strengthen the court's basic conviction that the protection of American Airlines' corporate name did not involve an issue of substantial public interest; these references were not included, as petitioner's brief suggests, for the purpose of holding that there could be no unfair method of competition in the absence of an actionable wrong at common law.

The same is even more true with regard to the lower court's alleged misreading or misapplication of this Court's decision in *Federal Trade Commission v. Raladam Co.*, 283 U.S. 643 (1931) (Pet. Br. 23). Petitioner's brief (page 22) brands as "palpable error" the court's reference to this Court's holding in the *Raladam* case, that there could be no unfair method of competition in the absence of "competition". Petitioner then assumes that, in referring to the *Raladam* case at p. 14 of its decision (R. 424), the court below overlooked the fact that the competitive injury requirement was "legislated out of Section 5 of the Trade Commission Act by the Wheeler-Lea Amendment in 1938" (Pet. Br. 23). May we invite the Court's attention to the fact that the reference to the *Raladam* case by the lower court (R. 424) had nothing whatever to do with the requirement of "competition" but was mentioned solely as further proof that this Court had

insisted upon the requirement of a specific and substantial public interest in cases of this sort. Nor does the Wheeler-Lea Act of 1938 which added the words "unfair acts and practices" to Section 5, suggest or require any change or modification in the basic jurisdictional requirement of a specific and substantial public interest. As a matter of fact, the lower court expressly stated that the public interest requirement had not lost any of its force because of the 1938 amendment (R. 424).

Therefore, petitioner's charge of "palpable error", based on the court's alleged overlooking of the Wheeler-Lea Act of 1938, is refuted by the very next paragraph in the court's opinion which follows the reference to the *Raladam* case.

IV

THE LOWER COURT WAS CLEARLY CORRECT IN SUGGESTING THAT IT WAS ERROR FOR THE BOARD, EVEN IF IT WERE ASSUMED THAT IT HAD JURISDICTION OVER THE PRESENT CONTROVERSY, TO HAVE ISSUED AN ORDER ABSOLUTELY ENJOINING RESPONDENT FROM ANY USE OF ITS TRADE NAME OR OF ANY NAME WHICH MIGHT INCLUDE THE COMMON GEOGRAPHICAL TERM, "AMERICAN."

We hope to have established in the previous portions of this brief that the lower court's decision, setting aside the Board's order for lack of a specific and substantial public interest, was correct and should be affirmed by this Court.

In the event, however, that a majority of this Court should disagree with the lower court and with our previous arguments, it may become necessary briefly to

review the drastic sanction which the Board sought to impose on the respondent by enjoining the latter from using its corporate name or any name including the word "American."

A brief consideration of the point of remedy may not be amiss, therefore, particularly since the Hearing Examiner, in the initial decision in this matter dealt with this problem and since both the dissenting Board Member and especially the lower court by way of dictum, indicate strong disapproval of any order which would, in effect, compel respondent completely to abandon its corporate name and all use of the word North American. The Hearing Examiner, although stating that in this unprecedented case "one must look for guidance to the decisions of the courts in their application of unfair trade practices as set forth under Section 5 of the Federal Trade Commission Act, which is essentially the same as Section 411 of the Civil Aeronautics Act," utterly failed even to consider the precedents set by this Court in connection with the remedy problem in Federal Trade Commission cases, but instead went on to review a line of decisions in private infringement suits in which the courts had held that, even a term such as "American" might acquire a secondary meaning and become entitled to protection against deceptive and unfair use by others. The Examiner then reached the following startling conclusion:

"The courts have consistently upheld the public interest as being the foremost issue in cases involving violation of trade-marks and have granted injunctive relief without proof of fraud, deception, or injury to the owner of the trade-mark." (R. 198).

Respondent candidly admits that it has been unable to find any case in which a trademark owner has been

granted relief in the absence of any fraud, deception or injury to himself but that, on the contrary, the courts, including this Court, have held on numerous occasions that any private right which a person may assert in a common geographical term, such as "American," should be most carefully circumscribed and limited. As against the cases cited by the Examiner (R. 225) and in petitioner's brief in this Court (p. 27, footnote 19), suffice it to refer to the precedents by this Court alluded to in the lower court's decision (R. 427). In addition to the cases there cited, attention may be called to the fact that in *American Steel Foundries v. Robertson, Commissioner*, 269 U.S. 372, 383 (1926), this Court cited with approval the following ruling by the Patent Office authorities:

"It would be a serious matter if the law actually permitted anyone who chose to do so to organize a series of corporations with names containing these words, respectively and thereupon virtually withdraw these words from public use as trade-marks and monopolize them, by preventing their registry as such."

In *Columbia Mill Company v. Alcorn*, 150 U.S. 460 (1893), this Court held:

"The word 'Columbia' is not the subject of exclusive appropriation under the general rule that the word or words, in common use as designating locality, or section of a country, cannot be appropriated by any one as his exclusive trade-mark." (150 U.S. 460, 465).

And again:

"The appellant was no more entitled to the exclusive use of the word 'Columbia' as a trade-mark than he would have been to the use of the word 'America' or 'United States,' or 'Minnesota,' or 'Minneapolis.' These merely geographical names cannot be appropriated and made the subject of an exclusive property." (150 U.S. 460, 466).

Subsequently, in passing on the registrability of the words, "The American Girl," as applied to shoes, this Court specifically stated that if the mark there involved had been "American Shoes," no exclusive rights of any sort could have been acquired in the word "American." *Hamilton Shoe Co. v. Wolf Brothers*, 240 U.S. 231 (1915). Similarly, the lower court, in a decision by the late Chief Justice Vinson in *McGraw-Hill Pub. Co., Inc. v. American Aviation Associates, Inc.*, 117 F.2d 293 (D.C. Cir. 1940), decided that the publisher of a magazine entitled "Aviation" could not enjoin defendant from publishing a similar periodical under the name "American Aviation". We do not intend to burden this brief with additional references but have referred to a few pertinent cases in a foot note.²⁷

It would thus seem clear that the lower court was correct in stating that even if the present case were to be decided under the guidance of available precedents in the field of the private law of unfair competition and trademarks, it would have been extremely doubtful whether an equity court would grant the drastic relief or would indeed give any relief at all under the circumstances of the present case.

But more fundamental than that is the Examiner's and the Board's failure to pay any attention whatever to this Court's repeated pronouncement in Federal Trade Commission cases to the effect that "complete excision" of an established trademark or trade name should not be ordered if a less drastic remedy would suffice to safeguard the public against confusion. The dissenting Board Member felt strongly that the majority went too far in issuing an absolute prohibition and thereby nullified the efforts

²⁷ *American Automobile Association and California State Automobile Association v. American Automobile Owners Association* 13 P.2d 707 (Calif. Sup. Ct. 1932); *Olin Mathieson Chemical Corporation v. The Western States Cutlery and Manufacturing Company*, 227 F.2d 728 (10th Cir. 1955).

which respondent had made in building up public good will under the name North American. As far as Federal Trade Commission cases are concerned, the Court of Appeals for the Second Circuit held as long ago as 1938 in *Bear Mill Mfg. Co. v. Federal Trade Commission*, 98 F. 2d 67 (2d Cir. 1938), that corporate and trade names should not be destroyed when a lesser remedy would suffice. And this Court, in the case of *Federal Trade Commission v. Royal Milling Co.*, 288 U.S. 212 (1933), in a decision which was left undisturbed in this regard by the Court's more recent decision in *Jacob H. Siegel Co. v. Federal Trade Commission*, 327 U.S. 608 (1946), said:

"The orders should go no further than is reasonably necessary to correct the evil and preserve the rights of competitors and public; and this can be done, in the respect under consideration, by requiring proper qualifying words to be used in immediate connection with the name." (288 U.S. 212, 217).

In the *Siegel* case, this Court, through Mr. Justice Douglas, reaffirmed the *Royal Milling* ruling by emphasizing that, under the express words of Section 5 (c) of the Federal Trade Commission Act, the Court had power, *inter alia*, to modify the order of the Commission, but further held that judicial review in this regard was limited to an inquiry "whether the Commission abused its discretion in concluding that no change "short of excision" of the trade name would give adequate protection." (327 U.S. 608, 612). The Court, after reaffirming its policy against destruction of valuable business assets where less drastic means may accomplish the same result, found that the Commission had failed to give any consideration to the question whether a lesser remedy might have been sufficient and that the Court would not consider this question until the Commission had first expressly passed upon it. In the *Siegel* case—as in the present case—one of the members of the Federal Trade Commission wrote a brief dissenting opinion in which

the majority order was criticized as too harsh. After remand, a majority of the Commission reached the conclusion that complete excision of the trade name "Alpacuna" would result in undue hardship on the respondent and was not necessary for the protection of the public.

It is pointed out in petitioner's brief (page 15, footnote 7) that the issue of the scope of the Board's order was not expressly raised in the petition for review and that consequently, the problem dealt with in the *Siegel* case was not presented here. Respondent suggests, however, that since the Examiner, the majority of the Board, and the dissenting Board Member, as well as the lower court, extensively commented upon this aspect of the case, it must necessarily enter into the Court's consideration of the matter if, contrary to the lower court, this Court should come to the conclusion that the issue of the Board's order was within the latter's jurisdiction under Section 411 of the Civil Aeronautics Act. In that event, respondent submits, the complete disregard by the Examiner and by the majority of the Board of the established policy in cases of this sort, not to order absolute excision of trade names or corporate names where less drastic remedies may be available, and the lack of any indication in either the Examiner's initial decision or the Board's opinion that any alternative or less radical action was even considered, serve to fortify the lower court's conclusion that the Board, even if it had any jurisdiction over the present controversy in the first instance, failed properly to exercise it. It further serves to reemphasize that, contrary to petitioner's view, our courts are better equipped to adjudicate private issues of trademark infringement or unfair competition than an independent regulatory Government agency, and that Congress never intended, as petitioner suggests, that the

Civil Aeronautics Board should concern itself with predominantly private disputes of this nature.²⁸

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below, reversing the order of the Civil Aeronautics Board, was correct and should be affirmed by this Court.

Respectfully submitted,

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²⁸ *Federal Trade Commission v. Eastman Kodak Co.*, 274 U.S. 619, 623 (1927): "The Commission exercises only the administrative functions delegated to it by the Act, not judicial powers. (Citing cases). It has not been delegated the authority of a court of equity."